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PRACTICAL AND ELEMENTARY

Abridgment of the Common Law

AS ALTERED AND ESTABLISHED

BY THE

RECENT STATUTES, RULES OF COURT,

AND

MODERN DECISIONS;

COMPRISING A

FULL ABSTRACT OF ALL THE CASES

ARGUED AND DETERMINED

IN THE

Courts of Common Law, & on Appeal.

WITH

THE RULES OF COURT, FROM M. T. 1824, TO M. T. 1840, INCLUSIVE,

AND

THE STATUTES DURING THE SAME PERIOD.

WITH

*CONNECTING AND ILLUSTRATIVE REFERENCES TO THE EARLIER
AUTHORITIES AND EXPLANATORY NOTES.*

By CHARLES PETERSDORFF, Esq.,
OF THE INNER TEMPLE, BARRISTER AT LAW.

VOL. II.

LONDON:

V. & R. STEVENS AND G. S. NORTON, 26 & 39, BELL YARD, LINCOLN'S INN,
Law Booksellers & Publishers,
(Successors to the late J. & W. T. CLARKE, of Portugal Street);
AND ANDREW MILLIKEN, GRAFTON STREET, DUBLIN.

1842.



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LONDON:

W. M'DOWALL, PRINTER, PEMBERTON-ROW,
GOUGH-SQUARE.

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PRACTICAL ABRIDGMENT

OF THE

REPORTS OF CASES

ARGUED AND DETERMINED

IN THE COURTS OF

Queen's Bench, Common Pleas, & Exchequer,

FROM

MICH. TERM, 4 GEO. 4, TO MICH. TERM, 3 VICT.

AND OF

THE RULES OF COURT, STATUTES, &c. &c. &c.

Bankrupt*

See tits. *Composition with Creditors—Guarantee—Insolvent—Lien—Partnership—Set-off—Stoppage in Transitu.*

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I. OF THE PERSONS WHO MAY, OR MAY NOT, BE BANKRUPTS*.

1st.—WITH REFERENCE TO THE PERSON.

(a) FEME COVERT.

Ex parte FRANKS, T. T. 1831. C. P. 7 Bing. 762; S. C. 6 M. & P. 1; S. C. 1 M. & Scott, 1.

J. F., a glass and earthenware dealer at Portsea, was, in 1821, convicted of feloniously having in his possession Bank of England notes, knowing them to be forged, and sentenced to be transported for fourteen years. He was taken on board a convict hulk in Ports-

The wife of a felon sentenced to transportation, if she be-

* By 6 Geo. 4, c. 16, s. 1, it is enacted, "That all bankers, brokers, and persons using the trade and profession of a scrivener, receiving other men's monies or estates into their trust or custody, and persons insuring ships or their freight, or other matters, against perils of the sea, warehousemen, wharfingers, packers, builders, carpenters, shipwrights, victuallers, keepers of inns, taverns, hotels, or coffee-houses, dyers, printers, bleachers, fullers, calenderers, cattle or sheep salesmen, and all persons using the trade of merchandize by way of bargaining, exchange, bartering, 'commission, consignment,' or otherwise, in gross or by retail, and all persons who, either for themselves or as agents or factors 'for others,' seek their living by buying and selling, or 'by buying and letting for hire, or by the workmanship of goods or commodities,' shall be deemed traders liable to become bankrupt; provided that no farmer, grazier, common labourer, or workman

comes a trader, is liable to the bankrupt laws, although he, in fact, remains in this country*.

mouth harbour, where he has been since kept, and where his wife, Kezia, was allowed to visit him. Since his conviction, she carried on the business. In July, 1827, a commission of bankruptcy was awarded against her, under which she was found and declared a bankrupt. In the conduct of her business, Kezia never assumed to be an unmarried woman, but she used to accept, in her own name, bills of exchange in favour of those who gave her credit, and her dealings were in the name of Kezia; but her correspondents, gene-

for hire, receiver-general of the taxes, or member of or subscriber to any incorporated, commercial, or trading companies, established by charter or act of Parliament, shall be deemed, as such, a trader liable by virtue of this act to become bankrupt."

Aliens and denizens may be bankrupts. (6 Geo. 4, c. 16, s. 135; *Alexander v. Vaughan*, Cowp. 398).

Ambassador or public minister's servant may be a bankrupt. (7 Anne, c. 12).

Attainted persons, it seems, may be bankrupts. (*Ex parte Bullock*, 14 Ves. Rep. 452; *Forster*, C. L. 61).

A clergyman, if he trade, may become a bankrupt. (*Hankey v. Jones*, Cowp. 745. See *Rawlinson v. Pearson*, 5 B. & Ald. 124).

Commons, members of, may be bankrupts. (4 Geo. 3, c. 33; 6 Geo. 4, c. 16, s. 9).

Executors and administrators, if they carry on the testator's business, may be bankrupts. (*Viner v. Cadell*, 3 Esp. 90). But, in general, a person who deals in autre droit, is or is not liable to be a bankrupt on account of such dealings, according as the dealings are occasional or permanent. (1 Atk. 101; 10 Ves. 120).

If the executor of a trader only disposes of the stock of his testator, it will not make him liable to be a bankrupt; (1 Atk. 102); even although it is necessary for him to buy ingredients to render that stock marketable. (1 Atk. 102). The true distinction seems to be this: if an executor or administrator only buys with an intent of selling the testator's stock in trade as soon as it can be conveniently done, he would not be considered a trader. But if he carries on the trade with an intent to continue it indefinitely, and to make a general profit for the benefit either of himself or of those who were entitled to the testator's or intestate's stock in trade, he clearly would be a trader subject to the bankrupt laws.

Insolvent debtor.—A debt though in the schedule of an insolvent discharged under the 53 Geo. 3, c. 102, was holden to be an existing legal debt sufficient to support a commission of bankruptcy. (*Jellis v. Mountford*, 4 B. & Ald. 256). And, under 1 & 2 Vict. c. 110, s. 8, an insolvent may be made a bankrupt. (See Stat. ab. post, div. II., p. 33).

Lunatic, it seems, may be a bankrupt. (*Crisp v. Perot*, Willes' Rep. 473; 6 Ves. 439; 13 Ves. 590).

Peers may be bankrupts. (*Ex parte Meymett*, 1 Atk. 197; *Ex parte Harcourt*, 2 Rose 203; 6 Geo. 4, c. 16, s. 9).

* As the coverture is suspended, by the husband abjuring the realm or being transported. (*Belkrap's Case*, 2 H. 47, a.; 1 H. 41, a.; *Sparrow v. Carruthers*, cited in 2 Bl. Rep. 1197, and in 1 T. R. 7; *Barrow v. Blencow*, 1 Esp. 27; *Bogget v. Frier*, 1 M. & S. 302; 1 Selw. N. P. 280, 5th edit.; 2 B. & P. 231). But, in general, a fiat cannot issue against a married woman; (see post, tit. *Husband and Wife*); even upon a trading and act of bankruptcy committed when single; (*Ex parte Mear*, 2 Bro. 266; C. B. L. 35); and though separated from her husband, who is in England, she cannot trade so as to become a bankrupt. And notwithstanding it has been holden, that a feme covert, separated by articles from her husband, who is abroad, having property settled upon her after marriage by him in trust for her separate use, with liberty to trade upon her own account, may be a bankrupt; (*Ex parte Prestons*, Green, 91); yet this seems questionable, from the new light in which the law now views married women, even though the husband be a foreigner. (See *Kay v. Duchess de Pienne*, 3 Campb. 123; overruling *Walford v. Same*, 2 Esp. 544; *Franks v. Same*, Id. 587; also *De Gailon v. D'Agle*, 1 B. & P. 357; *Marshall v. Rutton*, 8 T. R. 545; 1 N. R. 80; 11 East, 301; and 1 Christian's B. L. 69 to 74).

By the law of Scotland, where there is a separation, and the wife acts as a single woman, and, entering into trade, is in that character trusted, she may be a bankrupt. (Bell, 50).

rally, knew that she was a married woman, and was continuing her husband's business for herself and family. II. J., the petitioning creditor, was the holder of two bills drawn upon, and accepted by, her in her own name, and indorsed to him, before due, for value. When he took them he was ignorant of her husband being alive, but he had notice of the fact before he struck the docket.

The Court certified, that the wife was a trader, and liable to become bankrupt under 6 Geo. 4, c. 16.

See 1 *T. Rep.* 7; 1 *B. & P.* 357; 2 *B. & A.* 258; 3 *B. & C.* 291; 2 *C. & P.* 34.

(b) INFANT.

O'BRIEN v. CURRIE, H. T. 1828. N. P. 3 *C. & P.* 283.

TRESPASS.—The defendant had sued out a fiat against the plaintiff, who was a minor.

Burrough, J., ruled—That it was quite clear that it was not sustainable, but absolutely void.

See *Rex v. Cole*, 1 *Ld. Raym.* 443; 12 *Mod. Rep.* 243; *Holt*, 360.

BELTON v. HODGES, M. T. 1832. C. P. 9 *Bing.* 365; 2 *M. & Scott*, 496.

THIS was an action brought by the plaintiff, who had been declared a bankrupt, against the defendant, the assignee under the commission issued against him, for the purpose of trying the validity of such commission. It appeared that not only the petitioning creditor's debt was contracted by the plaintiff, and the trading upon which he was declared bankrupt was carried on by him, and the act of bankruptcy committed during his infancy, but also the commission of bankruptcy itself was issued out against him whilst he still continued an infant. A verdict was found for the plaintiff; on motion for a nonsuit—

Per Cur.—That a commission of bankruptcy issued against an infant would, under ordinary circumstances, be superseded, upon the ground of infancy, by the Lord Chancellor, has been held to be law beyond a doubt since the case of *Ex parte Sidebotham*, 1 *Atk.* 146, where Lord Hardwicke, on superseding a commission on that ground, said, “Notwithstanding Lord Mansfield held, in the case of *Ex parte Whitelock*, that an infant might be a bankrupt, yet it has been determined otherwise since.” But the question before us is, whether, without applying to the Lord Chancellor for a supersedeas, the commission may, under these circumstances, be held invalid by a court of law. And upon that point we are of opinion, that the commission is altogether void.

Fiat cannot be sustained against an infant*.

Which is void, and not merely voidable.†

* And where one of a firm is a minor, there cannot be a joint commission, and it may be superseded, not only upon the petition of the infant, but of any other persons interested, as of the assignees under a separate commission. (*Ex parte Henderson*, 4 *Ves.* 163, 173; *Ex parte Bauves*, 6 *Ves.* 102).

† But if an infant accept a bill soon after coming of age, which was drawn before, a commission may be sustained against him thereon. (*Stevens v. Jackson*, 4 *Campb.* 165).

2nd.—WITH REFERENCE TO THE TRADING.

(a) OF THE PLACE WHERE CARRIED ON*.

(b) OF THE TIME OF TRADING.

SURTEES v. ELLISON, T. T. 1829. K. B. 9 B. & C. 750; S. C. 4 M. & R. 586.

A commission of bankruptcy under 6 Geo. 4, c. 16, cannot be supported by evidence of a trading before the act came into operation.

THE bankrupt had ceased trading for four years previously to the passing 6 Geo. 4, c. 16:—Held, that he could not be deemed to continue trading until his debts were paid; and not being a trader after the act, he could not be subject to its provisions, nor the commission supported.

Lord *Tenterden* said—It has been long established, that, when an act of parliament is repealed, it must be considered as if it never had been made, except as to transactions which are closed. That is the general rule; and we must not break in upon that by indulging in conjectures as to the intention of the legislature. We are therefore to look at the statute 6 Geo. 4, c. 16, as if it were the first that had ever been passed on the subject of bankruptcy.

BAILLIE v. GRANT, E. T. 1831. C. P. 9 *Bing.* 121; S. C. 2 M. & Scott, 193.

A debt contracted before the party was intrade, but who afterwards becomes a trader and commits an act of bankruptcy, is sufficient to sustain the fiat.

THE bankrupt, previous to his becoming a trader, became indebted to the petitioning creditor in a sum exceeding 100*l.*, and afterwards became a trader, but ceased to be such at the time of committing an act of bankruptcy.

The Court held—That the commission might be supported upon such debt and act of bankruptcy.

WORTH v. BUDD, E. T. 1831. K. B. 2 B. & Ad. 172; S. C. 1 D. P. C. 328, not S. P.

A trading before the 6 Geo. 4, c. 16, is admissible evidence to shew the nature of the trading.

PRIOR to the 6 Geo. 4, c. 16, the bankrupt, a farmer and grazier, had bought cattle, not for the purpose of his farm, but of sale, and, after the passing of the act, had in some few instances bought and sold cattle in like manner.

The Court held—That the previous acts were admissible in evidence to explain the nature of the subsequent acts.

* It is not essential that the trading should be in England. (1 Raym. 375). A trader residing out of England, either in a country belonging to the kingdom, or to any foreign power, but who buys in England, or sells in England, may be a bankrupt. A person, living in India, continually drawing bills on English bankers, and gaining by the rate of exchange, (5 T. R. 530), or a person living in the Isle of Man, coming from time to time to England, and sending goods to the island to be sold, may be bankrupts. (4 B. & Ald. 418).

(c) OF THE PARTICULAR TRADE CARRIED ON*.

* An Alphabetical List of the particular trade carried on, whether or not subjecting the party to the Bankrupt Laws, may be useful:—

- Agent*, may, 6 Geo. 4, c. 16, s. 2.
Alum Maker, cannot be a bankrupt as such, 1 Cooke, B. L. 66.
Army Agent, could not, 1 Mont. B. L. 12, before 6 Geo. 4, c. 16, s. 1.
Artizan, cannot, Cro. Car. 551.
Attorney, as such, cannot, see post, div. *Scrivener*, p. 18.
Auctioneer, may, 6 Geo. 4, c. 16.
Baker, may, 4 Burr. 2066; 3 Mod. 330.
Banker, may, 6 Geo. 4, c. 16, s. 1.
Bills, negotiator of, may, if for the sake of profit, 5 T. R. 530; but not on casual drawing, Cowp. 745.
Blacksmith, may, 1 Chitt. B. L. 49.
Bleacher, may, 6 Geo. 4, c. 16.
Brewer, may, Cooke, B. L. 48.
Broker, may, 6 Geo. 4, c. 16.
Builder, may, 6 Geo. 4, c. 16; formerly he could not, 5 Esp. N. P. 147; 2 Campb. N. P. 300.
Burner of Lime, cannot, Rose, 316.
Butcher, may, 4 Burr. 2148.
Buying and letting for Hire, such persons may be, 6 Geo. 4, c. 16.
Calenderer, may, 6 Geo. 4, c. 16.
Carpenter, may, 6 Geo. 4, c. 16; before that statute it was questionable, 3 Mod. 155.
Carrier, may, 6 Geo. 4, c. 16.
Cattle Factor and Salesman, may, 6 Geo. 4, c. 16.
Cheese Maker, cannot, if he makes it and sells it on his own farm, 1 Cooke, B. L. 60; 7 East, 447.
Clothier, may, 1 Cooke, B. L. 48.
Coal Mine, worker of, cannot, 2 Wils. 169.
Coffeehouse Keeper, may, 6 Geo. 4, c. 16.
Companies, public, member of, cannot, 6 Geo. 4, c. 16, s. 1, and see 3 *Peters*. Abr. 456.
Cowkeeper, cannot, 1 Swanst. 64.
Cyder Maker, cannot, 1 Cooke, B. L. 9.
Drover, may, 6 Geo. 4, c. 16.
Dyer, may, 6 Geo. 4, c. 16; Cro. Jac. 585.
Exchange, persons dealing by, may, 6 Geo. 4, c. 16.
Exchequer Bills, circulator of, cannot, Cooke, B. L. 79.
Excise, Commissioner of, cannot, Cooke, B. L. 68.
Factor, may, 6 Geo. 4, c. 16.
Farmer, as such, cannot, 6 Geo. 4, c. 16.
Freight, insurers of, may, 6 Geo. 4, c. 16.
Fuller, may, 6 Geo. 4, c. 16.
Grazier, cannot, 6 Geo. 4, c. 16.
Gross, person trading in, may, 6 Geo. 4, c. 16.
Gun Founder, to the Queen, cannot, Skin. 292.
Hire, persons buying or letting for, may, 6 Geo. 4, c. 16.
Hotel Keeper, may, 6 Geo. 4, c. 16.
Inn Keeper, may, 6 Geo. 4, c. 16.
Inns of Court, steward or butler of, cannot, Skin. Rep. 292.
Insurer, may, 6 Geo. 4, c. 16.
Iron Manufacturer, may, Cooke, B. L. 48.
Labourer, common, cannot, 6 Geo. 4, c. 16.
Lime Burner, if his own estate, cannot, Rose, 316.
Living by buying only or selling only, cannot, 1 Cooke, B. L. 74.
Locksmith, may, 1 Cooke, B. L. 48.
Manufacturer, may, 2 Bla. Com. 476.
Miller, may, 6 Geo. 4, c. 16.
Milliner, may, 1 Cooke, B. L. 48.
Mine Owner, as such, cannot, 1 Cooke, B. L. 67.
Nailers, may, 1 Cooke, B. L. 48.
Navy, commissioners of, cannot, Skin. Rep. 291.
Newspapers, vendors of, may, 2 Marsh. Rep. 236; 6 Taunt. Rep. 532.
Occasional Dealers, may, Holt, 221.

1. *General Rules as to the Trading*.*2. *Agent†.*3. *Brickmaker.*

HEANE v. ROGERS, E. T. 1829. K. B. 9 B. & C. 577—S. P.
 SUTTON v. WEELEY, 7 East, Rep. 442; S. C. 3 Smith, 445
 —S. P. PARKER v. WELLS, 1 H. Blac. 639; 1 T. R. 783.

The making of bricks for sale from clay taken from a man's own land does not render him liable to be bankrupt, or a trader, although he may have bought the land for the purpose of making bricks‡.

THIS was an action against assignees.—The question was, whether the plaintiff was a trader. He had agreed with Colonel A. for the purchase of five acres of land at Cheltenham; but never had any conveyance made to him of the property. The terms were contained in a memorandum signed by the plaintiff and Colonel A., in which it was agreed, that the plaintiff was to pay towards the purchase-money four shillings for every thousand of bricks that should be made upon the ground; and that, at all events, the whole of the purchase should be paid within five years.

The plaintiff was let into possession under this agreement: and began making bricks, part of which he used in the building of

Packer, may, 6 Geo. 4, c. 16.
Painters, may, 1 Cooke, B. L. 48.
Pawnbroker, may, 5 B. & Ald. 124.
Plumber, may, 1 Cooke, B. L. 48.
Printer, may, 6 Geo. 4, c. 16.
Receiver-general of Taxes, cannot, 6 Geo. 4, c. 16.
Salesman, may, 6 Geo. 4, c. 16.
Scavenger, semble, cannot, Rose, 873.
Schoolmaster, cannot, 3 Mod. 330; Peake, N. P. 108.
Scrivener, may, 6 Geo. 4, c. 16.
Servant, may, 2 Marsh. 236; 6 Taunt. 532. But see 6 Geo. 4, c. 16.
Ship Agent, may, 6 Geo. 4, c. 16.
Ship Carpenter, may, 1 Ld. Raym. 741.
Shoemaker, may, 1 Cooke, B. L. 48.
Smuggler, may, 5 B. & Ald. 516; S. C. 1 D. & R. 111.
Stable Keeper, see post, p. 20.
Standing Timber, buyers and sellers of, may, 1 Cooke, B. L. 73.
Stock, Government, dealer in, cannot, 2 P. Wms. 308.
Stone, dealer in, sold from his own estate, cannot, 1 Beames, 48.
Tailors, may, 1 Cooke, B. L. 48.
Tanner, may, 1 Cooke, B. L. 48.
Tavern Keeper, may, 6 Geo. 4, c. 16.
Timber, dealer in, may, 2 Taunt. 170.
Underwriter, may, 6 Geo. 4, c. 16.
Victualler, may, 6 Geo. 4, c. 16.
Warehouseman, may, 6 Geo. 4, c. 16.
Wharfinger, may, 6 Geo. 4, c. 16.
Workman, for hire, cannot, 6 Geo. 4, c. 16.

* In trying the question of trading, the plaintiff is not precluded by the limited description in the commission from proving any species of trading. (*Smith v. Sandilands*, 1824, N. P., 1 Gow. 171). A stock in trade is not essential to constitute a trading; but before 6 Geo. 4, c. 16, s. 6, a party selling goods on commission for other persons was not a trading. (*Doe d. Barraud v. Lawrence*, M. T., 1825. N. P., 2 C. & P. 134). Goods bought in connexion with others, on a system of fraud, is not a trading. (*Millikin v. Brandon*, T. T., 1824. N. P., 1 C. & P. 380).

† The 6 Geo. 4, c. 16, expressly declares, that agents shall be subject to the bankrupt laws.

‡ And buying chalk, for the purpose of burning it with the clay, to improve the bricks, or selling portions of the chalk or lime, is not a trading. (*Paul v. Dowling*, M. T. 1829, N. P., 1 M. & M. 263; S. C., 3 C. & P. 500).

houses, and the remainder he sold to several persons during the years 1825 and 1826. On his examination before the commissioners, he stated, that he had bought the land of Colonel A. for the purpose of brick-making. Under the commission the plaintiff assisted in assorting and lotting them; but the witness who proved this admitted, that what the plaintiff thus did was nothing more than an endeavour to assist in causing the goods to be sold to the best advantage. The plaintiff, at the time of his alleged bankruptcy, was the lessee, for a term of years, of a farm under Messrs. Watkins. The day after the sale of his goods by the defendants, he gave the following notice to his landlords:—I, the undersigned James Heane, of the city of Gloucester, brickmaker, dealer, and chapman, a bankrupt, do hereby give you notice, that I am ready and willing, and hereby offer and deliver up unto you a certain indenture, purporting to be a lease of, &c.

The Court held, that he was not within 6 Geo. 4, c. 16, s. 2, "a person seeking his living by buying and selling, or seeking his living by the workmanship of goods and commodities," which latter words seem intended to meet the case of persons who make for others.

4. *Fisherman*.*.

5. *Horses, Dealers in.*

MARTIN *v.* NIGHTINGALE, H. T. 1826. C. P. 3 *Bing.* 421; S. C. 11 *Moore*, 305.

THE widow of a livery stable-keeper and horse-dealer, purchased horses to let out to hire, and occasionally sold some, but had taken out no licence.

The Court held, that this was sufficient to constitute a trading within the meaning of the Bankrupt Laws; and where, on the Judge's intimating such an opinion, the defendant's counsel acquiesced, and the question of trading was not left to the jury, the Court refused to grant a new trial.

See 1 *T. R.* 573; 1 *Price*, 20; 7 *Taunt.* 409; 2 *G. & J.* 183.

Purchasing horses to let out to hire, and occasionally selling them, but without a licence, is a trading†.

6. *Lodgings, letting of.*

SMITH *v.* SCOTT, E. T. 1832. C. P. 9 *Bing.* 14; S. C. 2 *M. & Scott*, 35.

THE bankrupt gained her livelihood by letting lodgings in a house to which there was no public sign or name; she received families or single men for long or short periods; if required to do so, she found and cooked provisions for them, charging more than she paid, or as the witness termed it, "the market penny;"

Letting lodgings and procuring and dressing food for lodgers at a profit, is a

* Semble, The purchases of oil, at distant periods, by persons engaged in the Greenland whale fishery, is not a trading. (*Gale v. Halfknight*, 1823, N. P., 3 Stark. 56). But a fisherman's purchasing fish at sea to sell again is a trading. (3 *Campb. N. P.* 233).

† But purchasing dead horses for the sustenance of dogs, and selling their skins and bones, is not a trading. (*Somerset v. Jarvis*, 6 *Moore*, 56; S. C. 3 B. & B. 2).

trading as an
hotel-keeper*.

but that the provisions so found did not form any general stock of her own, but were kept separately for the individuals for whom they were respectively procured; that she took her orders every Monday morning, and was usually paid once a week, although some of her guests stayed only a single night. She had no license, her name was not on the door, and there was nothing to shew the character of the house beyond that of a lodging-house. "Lodgings to let" usually appearing in the window.

Tindal, C. J., directed the jury to consider whether the bankrupt sought her livelihood by a profit derived from the provisions she furnished to her lodgers, or only furnished the provisions incidentally, looking to the lodgings as her means of livelihood. The jury found in the affirmative of the first proposition, and the Court refused to disturb the verdict.

See 1 *B. & C.* 666; 3 *Id.* 368; 9 *East*, 215.

7. Ship-broker.

POTT v. TURNER, T. T. 1830. C. P. 6 *Bing.* 702; S. C. 4 *M. & P.* 551.

A ship-broker
is to be deemed
a trader liable
to be bankrupt,
within 6 Geo.
4, c. 16.

THE 2nd section of the 6 Geo. 4, c. 16, enacts, that "all bankers, brokers, and persons using the trade or profession of a scrivener, receiving other men's monies or estates into their trust or custody, shall be deemed traders liable to become bankrupt."

Held, that a ship-broker is a broker within the meaning of the statute, and that the words "receiving other men's monies or estates into their trust or custody," apply to bankers and brokers as well as to scriveners.

See *Rawlinson v. Pearson*, 5 *B. & A.* 124.

8. Stable-keeper.

CANNAN v. DENEW, M. T. 1833. C. P. 10 *Bing.* 292; S. C. 3 *M. & Scott*, 761.

A livery stable-
keeper is a
trader within
the bankrupt
laws†.

THE bankrupt, a livery stable-keeper, was found, on a case reserved for the opinion of the Court, to have been in the habit of purchasing hay and corn, which he kept in his own stable, which he supplied to the horses at livery, and which he also sold to all who wished to buy, as is done in all livery stables.

The Court held, that such party is a trader within the 2nd sect. 6 Geo. 4, c. 16, and that his character or responsibility as such is not qualified by the words "as is done in all livery stables."

* Hotel-keeper may be bankrupt. (6 Geo. 4, c. 16).

† But persons merely letting horses for hire, are not subject to the bankrupt laws. (1 Cooke, B. L. 77. But see 3 *Bing.* 421; ante, p. 19). Nor is a trainer of race-horses, or keeper of racing stables. (*Ex parte Chiffney*, Court of Review, 1837).

II. OF THE SEVERAL ACTS WHICH MAKE A PERSON A BANKRUPT.

(a) OF ACTS OF BANKRUPTCY GENERALLY*.

MAGGS *v.* HUNT, E. T. 1827. C. P. 4 *Bing.* 212; S. C. 12 *Moore*, 357;—S. P. HEWSON *v.* HEARD, T. T. 1829. K. B. 9 *B. & C.* 754, n.

THE act of bankruptcy was committed on or about the 6th June, 1825, by the bankrupt, Follett, absenting himself from his dwelling-house, and the commission was not sued out until the 8th September following.

Per Cur.—The stat. 6 Geo. 4, c. 16, s. 1, repealed all former acts relating to bankrupts; but, by the last section, viz. the 136th, that statute was not to take effect before the 1st September, 1825. Although, therefore, all former statutes were repealed by the first sect. of 6 Geo. 4, still its general operation was to be suspended by the last; and taking the two sections together, the act in question did not come into operation until the 1st September, 1825, and here the commission was not issued until the 8th, which was then founded on an act of bankruptcy in June preceding. Now, we are of opinion, that there was no act of bankruptcy on which the commission could be supported, as all the previous statutes were entirely got rid of on the 1st September, 1825, and the act in question was not in force at the time the act of bankruptcy was committed.

The act of bankruptcy must not be before 1st September, 1825, when the 6 Geo 4, c. 16, came into operation.

PHILLIPS *v.* HOPWOOD, M. T. 1829. K. B. 10 *B. & C.* 39; S. C. *Lloyd & Welsby*, 65.

THE act of bankruptcy was committed in March, 1825; the commission issued in July of that year. The 5th Geo. 4, c. 98, which repealed all the former Bankrupt Acts, came into operation on the 1st of May, 1825; the 6 Geo. 4, c. 16, which repealed the 5th Geo. 4, c. 98, came into operation as to such repeal on the 2nd May, and for general purposes on the 1st September, 1825.

Per Cur.—This commission does not depend for its validity on any thing done on the 1st May. When the 5 Geo. 4 was repealed on the 2nd May, all the old statutes were revived till the 1st September, and the 5 Geo. 4 became, as to this question, as if it had never

But a commission, issued in July, 1825, founded upon an act of bankruptcy committed in the preceding March, may be sustained, notwithstanding 5 Geo. 4, c. 98,

* Of the acts of Parliament relating thereto, and the mode in which they are construed, see 3 *Peters. Ab.* 482.

1st. *Of the locality of, or place where committed.*—The act of bankruptcy must in general be committed in England. *Cowp.* 401. Hence, before 6 Geo. 4, c. 16, a fraudulent deed, executed abroad, was not an act of bankruptcy. 5 *Ter. Rep.* 530. But this is now altered by 6 Geo. 4, c. 16, s. 3.

2nd. *Of the time of, in relation to the party being in trade.*—Although a party retires from trade, he may afterwards commit an act of bankruptcy in respect of creditors whose debts were contracted during the trading, or contracted before, and were subsisting debts while he was in trade. (1 *Vent.* 166; *Sid.* 411; 1 *Ld. Raym.* 287).

3rd. *Of purging or explaining away an act of bankruptcy.*—Where an act is equivocal, circumstances may explain it, and where it appears not to have been done with intent to defeat creditors; but an act once committed, plainly and decidedly with that intent, can never be purged or explained away by any thing done afterwards. (1 *Salk.* 110; *Holt*, 95; 1 *Burr.* 467; 2 *Ter. Rep.* 59; 3 *Esp.* 244).

and 6 Geo. 4,
c. 16 *.

existed. Both the act of bankruptcy and the commission were under the old statutes, and we therefore think the commission is valid.

COOK *v.* CALDECOT, T. T. 1830. N. P. 4 C. & P. 315; S. C. 1 M. & M. 522.

Selling goods far below cost prices may be an act of bankruptcy under 31st sect. of the 6 Geo. 4, c. 16.

THE bankrupt had bought and sold goods the same day; selling them at 30 per cent. less than the price he agreed to pay for them. Lord *Tenterden* said, the words of the 31st sect. 6 Geo. 4, c. 16, are, "fraudulent gift, delivery, or transfer; and, as a sale is one species of transfer, I think that a sale of goods *may* be a fraudulent transfer within this enactment; but, although a sale *may* be within this act, yet, I think, that it cannot be so held, unless the circumstances were such that the buyer, as a man of business, must have been led to suppose that the seller was a person who was going to become a bankrupt, and wished to get money into his hands to cheat his creditors."

MARSHALL *v.* BARKWORTH, H. T. 1833. K. B. 1 N. & M. 279; S. C. 4 B. & Ad. 508.

An act of bankruptcy, concerted † with the petitioning creditor, will not support a commission.

Davis, the bankrupt, a bookseller, having become indebted to Messrs. Raikes, the bankers, in a considerable sum of money, gave them a warrant of attorney for £2000 as a security. On the 2nd of June, 1832, judgment was entered up, and a fi. fa. issued to the defendant as sheriff of Hull, to levy £1036 17s. 1½d.; and, on the 3rd of June, the sheriff's officer seized the stock in *Davis's* shop. On the 4th of June, a docket was struck against *Davis*, of which notice was served upon the defendant on the 6th June. On the 9th June a fiat in bankruptcy issued, *to support which* evidence was given, that, on the 6th June, *Davis* had executed a deed of assignment of the whole of his effects, for the benefit of all his creditors. The defence set up was, that the act of bankruptcy had been concerted.

Per Cur.—Before the 6 Geo. 4, a deed of assignment, concerted by the parties, could not have been set up by one of the parties joining to it as an act of bankruptcy. We admit that the deed is

* A man cannot commit an act of bankruptcy by the conduct of his agent. (*Cotton v. Jones*, M. T., 1829, N. P., 1 M. & M. 273; S. C., 3 C. & P. 505, not S. P.; S. C., 1 B. & Adol. 128).

† The 6 Geo. 4, admits of one exception to the rule prohibiting concerted acts of bankruptcy, by directing, that no commission shall be deemed invalid by reason of a declaration of insolvency filed at the Bankrupt Office having been concerted between the bankrupt and any creditor or other person. In all other instances, it is settled, that a concerted act of bankruptcy is of no avail, (1 Blac. Rep. 441; 1 Esp. 108; Holt, 13; Lofft, 427), against persons not joining or consenting to it. (1 Cooke, B. L. 97, 98; Peake, N. P. C. 27). And that those who assented to it shall not be allowed to set it up as an act of bankruptcy against them, but the bankrupt himself, and all those coming in under the commission, (now fiat), are excluded from saying any thing against it. (2 Ter. Rep. 594). But, if the petitioning creditor were not privy to the act of bankruptcy, it is no objection that the assignees were; (4 East Rep. 230; S. C. 1 Smith's Rep. 33; 2 Campb. N. P. 49); nor that the solicitor was, (Peake, N. P. 37), unless he be the agent of the petitioning creditor as well as the bankrupt. (Holt, N. P., 442). And a commission, (now fiat), issued upon a concerted act of bankruptcy, may be superseded, if another good act of bankruptcy can be established. (1 Stark., N. P. 262; Id. 134).

not fraudulent in itself, but it is fraudulent within the meaning of the bankrupt acts. We can easily conceive, that where there has been one good act of bankruptcy, every thing else may be concerted without any inconvenience. Before the statute, if there had been a trading, a petitioning creditor's debt, and an act of bankruptcy, yet if the commission itself had been concerted, it would have been supersedable. It was to protect such a commission that this act was made, but a concerted act of bankruptcy is still a nullity.

(b) OF PARTICULAR ACTS.

1st.—*As relates to the Personal Conduct of the Trader.*

1. *By departing the Realm*.*

2. *By remaining Abroad†.*

3. *By Departure from Dwelling-house.*

HALLEN v. HOMER, T. T. 1823. N. P. 1 C. & P. 108.

TROVER against assignees. It was proved, that the plaintiff did not go as usual to his counting-house, and that the plaintiff had made declarations indicative of his bad circumstances; and it was proved that he kept out of the way, and avoided payment of a baker's bill of 1*l.* 15*s.*, for which sum the baker often called, but could neither see the plaintiff nor get his money.

Parke, J., held, that whether in fact a creditor was delayed or not made no difference, if the evidence satisfied the jury that he absented himself with that intent.

The departure to delay creditors need not produce actual delay, and may be from "any" place;

SCHOOLING v. LEE, 1820. N. P. 3 Stark. 149.

THE bankrupt, having been arrested, had been released on a promise to execute a bail-bond, and was repeatedly denied to the officer who called for that purpose; but there was no proof of such denial being by his orders:—Held, 1st, that such denial, not being in order to avoid a creditor, but merely the execution of a bond, was not *prima facie* evidence of an act of bankruptcy; and 2nd, that the declaration being subsequent to the act of bankruptcy was inadmissible.

but when done to avoid executing a bail-bond it is not an act of bankruptcy‡.

* By the 6 Geo. 4, c. 16, "If any trader shall depart this realm, with intent to defeat or delay his creditors, he shall be deemed to have thereby committed an act of bankruptcy." It is settled, that a departure of a debtor from his house with intent to delay his creditors is an act of bankruptcy, though no creditor be in fact delayed; (9 East Rep. 487); and where the delay of creditors is the necessary consequence of the trader's absenting himself, the departure constitutes an act of bankruptcy. (1 Campb. N. P. C. 279). But, if a trader depart with an honest intention, compatible with business, he does not commit an act of bankruptcy. (Holt, N. P. 175; 4 Campb. N. P. 286; 1 Stark., N. P. 146).

† By 6 Geo. 4, c. 16, "If any trader shall depart this realm, or being out of this realm, shall remain abroad, with intent to defeat or delay creditors, he shall be deemed to have committed an act of bankruptcy."

‡ So, where the only evidence was a statement in the depositions of the bankrupt having failed to attend an appointment made for his giving security for a debt, and nothing appeared as to any intention to delay creditors:—Held, that it was not even *prima facie* evidence of an act of bankruptcy. (*Tucker v. Jones*, 2 Bing. 2).

BATCHELOR *v.* VYSE, T. T. 1834. C. P. 4 *M. & Scott*, 552; *overruling* S. C. *M. & Rob.* 331.

But if a trader quit his home after his goods have been seized under an execution, it may be an act of bankruptcy.

THE bankrupt's goods had been seized under a *fi. fa.*, while the officer was in possession. He departed from his dwelling-house. *Tindal*, C. J., left it to the jury to say, whether he departed with the *bonâ fide* intention to endeavour to procure the means of removing the execution, or whether, having gone for that purpose, he stayed away with the design of avoiding his creditors. The jury found in favour of the latter proposition; and the Court, on motion, held the direction of the Chief Justice to be right.

4. *By otherwise absenting himself.*

BERNASCONI *v.* FAREBROTHER, H. T. 1830. K. B. 10 *B. & C.* 549; S. C. 5 *M. & R.* 364.

The absenting should be from some place, where, from the ordinary course of the bankrupt's life and business, he might be expected to be present.

Per Tenterden, C. J.—If the trader committed an act of bankruptcy, it must have been by absenting himself; but this has been hitherto confined to the case of a party absenting himself from his regular place of business, at which a man would be expected to be found, or from one or more particular creditors; for instance, the Royal Exchange, where he expected to meet the persons to whom he was indebted; going behind the scenes at the theatre to avoid them, and so on. Now, there was, at the time at which this act of bankruptcy is supposed to have been committed, really no place of business, properly so called, to which the bankrupt could have occasion to resort, and therefore no act of bankruptcy.

PARK *v.* PROSSER, H. T. 1824. N. P. 1 *C. & P.* 176.

Though a denial to a creditor at a place not the bankrupt's usual place of business has been held an act of bankruptcy.

THE bankrupt had a place of business at the George and Vulture, but lodged at Pentonville, where he had stated, he wished persons not to call on business. A witness proved, that he had been denied to creditors at the latter place; and *Abbott*, C. J., ruled, that a creditor has a right to call on his debtor for money at the debtor's lodgings, or other place where he knows him to be, though it is not his place of business, and a denial to a creditor there is as much an act of bankruptcy as if it were his place of business.

ROBSON *v.* ROLLS, H. T. 1833. C. P. 9 *Bing.* 648; S. C. 2 *M. & Scott*, 786.

The avoiding to go into a particular county from the fear of arrest, to inquire whether personal process had been issued, is "an absenting with intent to delay creditors."

THE act upon which the plaintiffs relied for the purpose of supporting the commission was this: George had a creditor named Green, who, on the 11th February, sued out execution on a judgment which he had obtained against him. George being apprehensive of arrest, was anxious to discover the nature of the execution which his creditor sued out; and to ascertain whether it was a *feri facias* or a *ca. sa.*, he went to the bottom of Chancery Lane, and beckoned Whittaker, an officer of the sheriff of Middlesex, who was at the office, to come to him, that he might make the inquiry. The officer accordingly came, and George questioned him as to the nature of Green's writ, at the same time telling him, that, as the office was in Middlesex, he was afraid to go there, lest he should be arrested, in case the writ sued out by Green was against his person.

The officer, in answer to his inquiry, stated, that Green had not then sued out any execution. George renewed his inquiry at different times, and finally learned, that the execution sued out was against his goods. These facts having appeared on the trial, *Tindal*, C. J., did not think that they constituted an act of bankruptcy, and the jury found for the defendants.

On motion for a new trial the Court held—that *Tindal*, C. J., was right, the forbearance of George to go to a place, whither he would have gone but for the apprehension of arrest, was an act of bankruptcy, and within the words of the statute, “*otherwise absenting himself with intent to defeat or delay his creditors.*” The stopping by the party at one place, and his refraining from going to another, was as much a positive act done, as if he had gone in an opposite direction, in furtherance of the same object. Suppose the officer of the sheriff of Middlesex had a writ against George, and he had called him (the officer) into the city of London, where such a writ would have been inoperative, such conduct on his part would, undoubtedly, amount to an act of bankruptcy; he would, by such conduct, have been absenting himself, so as to occasion actual delay to his creditors; and, consequently, he would be considered as absenting himself with *intent to occasion such delay*. As to the circumstance of the officer having a warrant or not, it is perfectly immaterial.

SHANNON *v.* OWEN, M. T. 1827. K. B. 1 M. & R. 392, n.

BILL of exceptions as to the sufficiency of the act of bankruptcy, which consisted in the bankrupt absenting himself from his counting-house, and directing his clerk to say, that he had been there at the time he was so absent.

If a trader direct his clerk to say he is at his counting-house, when, in fact, he is absent, that is an absenting to delay his creditors.

Upon a writ of error in the Exchequer Chamber, that Court was of opinion, that though there was not sufficient evidence that the bankrupt had absented himself with intent to delay his creditors, that intent ought to have been found by the jury, and should not have been decided by the learned judge as a point of law, and a venire de novo was awarded.

5. *By beginning to keep House.*

SANDERSON *v.* LAFEREST, M. T. 1823. N. P. 1 C. & P. 46.

THE act of bankruptcy was being denied to a collector of king's taxes.

Burrough, J., ruled that it sufficed.

Denial to a collector of taxes is an act of bankruptcy.

BLEASBY *v.* CROSSLEY, M. T. 1825. N. P. 2 C. & P. 213; S. C. 3 Bing. 430; S. C. 11 Moore, 327.

To prove an act of bankruptcy the bankrupt's porter was called, who stated, that a person of the name of C. called at his master's house, and asked if he was within, and desired that he might be told, that J.'s bill was not honoured, and that he (C.) wished to see him; that the witness told his master, who desired him to say, that he was out of town. That upon this message being delivered to C., he disputed witness's word, and went up stairs towards the drawing-room, in

Denial to a party who calls to state dishonour of a bill, suffices if the bankrupt considers him as a creditor.

which the bankrupt was, and the bankrupt made his escape from that room, and went into another up stairs, in consequence of which C. did not see him.

Held, by *Best*, C. J., sufficient, if the jury thought the bankrupt believed C. to be a creditor.

CURTEIS v. WILLES, E. T. 1824. K. B. 4 D. & R. 224; S. C. 1 R. & M. 58, S. C. 1 C. & P. 211.

Concealing himself in an occasional place of transacting business suffices.

A TRADER, at W., on coming to London, went to the counting-house of C., where he generally transacted business with other persons; however, he desired C. to deny him to a creditor, and concealed himself in C.'s house when the creditor called.

Held:—An act of bankruptcy.

See *Bayley v. Scofield*, 1 M. & Selw. 338.

HUGHES v. GILMAN, T. T. 1825. C. P. 10 Moore, 480; S. C. 1 C. & P. 32—*S. P. CANNING v. BAILEY*, H. T. 1830. C. P. 6 Bing. 363; S. C. 4 M. & P. 306.

The intent is a question for the jury*.

A TRADER, confined in the King's Bench prison, obtained a day rule, and went to his place of business, and, instead of returning to the rules, slept at his house, and caused the shop to be closed earlier than usual, and ordered himself to be denied to the clerk of a creditor.

Held, that this was sufficient evidence to constitute an act of bankruptcy, and that it was properly left to the jury to determine, whether the shutting up the shop, at an earlier hour than usual, was not done as a colour to enable the party to cause himself to be denied to his creditors.

CHARRINGTON v. BROWN, E. T. 1830. C. P. 11 Moore, 341.

A bankrupt, called on by a creditor, pursuant to appointment, and, after seeing him, left the room, and his wife told the creditor he was gone out, this is an act of bankruptcy.

THE creditor called at the house of the bankrupt, by appointment, for payment of his debt, and saw the bankrupt, but who shortly after left the room, and did not return, and the wife afterwards informed the creditor he was gone out.

Held, that it was correctly left to the jury to decide, whether he left his house to avoid or delay a creditor, and that the wife's answer was admissible as part of the *res gestæ*.

JOHNSTON v. WOOLF, M. T. 1835. C. P. 2 Scott, 372.

A trader writing a letter from his place

It appeared, upon the trial of an issue, whether an act of bankruptcy had been committed, that, on the preceding day, A. had sent a letter from his place of residence to his place of business, stating

* The criterion as to the effect of beginning to keep house is the intent, not the cause. (*Lazarus v. Waithman*, 5 B. Moore, 313). Hence, where, on the 20th of May, a partner in a banking-house having been arrested at his private dwelling, distant several miles from the house of business, and having promised to execute a bail-bond when required, immediately ordered his servants not to let into the house any person whom they did not know, as he was fearful of being arrested; again, on the 21st, the doors were kept shut, and no person was admitted until it had been ascertained from the window who the applicant was:—Held, that, although no creditor was actually denied, an act of bankruptcy was committed on that morning. (*Harvey v. Ramsbottom*, 1 B. & C. 55; S. C., 2 D. & R. 142).

his inability to meet his engagements, and directing himself to be denied to creditors, and he immediately quitted home, and remained absent during that and the following day; and a witness, who saw him, stated, that he was not in a hurry to get home, and should not go out, as he had creditors who would lay hold of him.

Held, an act of bankruptcy, although the jury said that they did not believe he spoke *bonâ fide*.

of residence to his house of business, stating his inability to keep his engagements, and ordering himself to be denied, commits an act of bankruptcy.

HARE *v.* WARING, H. T. 1838. Ex. 3 *M. & W.* 376.

THE act of bankruptcy in this case, which was an action by the assignees against the defendant, for not accepting shares contracted for, consisted in a general order to be denied (which the jury found to be with intent to delay creditors), but no one was in fact denied, and the bankrupt did not secrete himself.

An order to deny, unacted upon, is not, it seems, an act of bankruptcy.

The Court thought, that a mere direction to deny was not enough, but abstained from giving any direct opinion.

Fiske v. Bowker, 10 *B. & C.* 705.

WIDGER *v.* BROWNING, H. T. 1827. K. B. 9 *D. & R.* 306.

THE bankrupt, on being applied to for a debt which he could not pay then, but promised to meet the creditor at an inn in the evening, but failed to keep his appointment.

The omission to keep an appointment with a certain creditor at a specified time and place, is an act of bankruptcy, with intent, &c., unless satisfactorily explained*.

Held, that it was for the jury to say with what intent, and whether he broke such appointment with any other than the intent to delay the creditor with whom he made it; and that the jury were properly directed, in the absence of any evidence, to explain it, if they were of that opinion, that an act of bankruptcy was committed, for the creditor, with whom the appointment was made, could not be supposed to have the means of shewing what had occasioned the debtor not to keep his engagement. That was within the knowledge of the debtor himself, and it was for him to shew the fact in order to rebut the inference.

CUMMING *v.* BAILEY, H. T. 1830. C. P. 6 *Bing.* 363; S. C. 4 *M. & P.* 36.

TWO of three partners, bankers, finding themselves insolvent, directed the doors and shutters of the banking-house, not their place of residence, not to be opened, and they were not, although persons were clamorous on the outside.

The closing of the doors and shutters of a bank is a beginning to keep house, though it is not the domicile of the bankers.

Held, to be a beginning to keep house within the statute.

Ex parte Moore, 19 *Ves.* 343.

FISHER *v.* BOUCHER, E. T. 1830. K. B. 10 *B. & C.* 705; S. C. 5 *M. & R.* 589.

THE bankrupt gave orders to his shopman to deny him to the sheriff's officer, if he called, but he did not call, and there was no proof that the party in any way secluded himself, nor of any actual

An order to deny to a sheriff's officer, but no proof of

* A trader, who hears himself denied, without having given any specific directions, and does not come forward, commits an act of bankruptcy if done with intent to delay creditors. (*Smith v. Moon*, 1829, N. P., M. & M. 458).

seclusion, or of the party keeping out of the way, or any actual denial, is not an act of bankruptcy*.

denial to a creditor:—Held to be no sufficient evidence of a “beginning to keep house;” it appearing, also, that he left his house to go his usual rounds, and called at a turnpike, to meet a letter expected from a creditor, intending, if it were unfavourable, to absent himself, but it turning out favourable, he pursued his rounds, and returned home as usual.

Held, that the jury properly found that he had not departed with intent to delay creditors, the departure must be with an *absolute*, not a mere inchoate intent.

KEY v. SHAW, M. T. 1831. C. P. 8 Bing. 320; S. C. 1 M. & Scott, 462.

And it is for the jury to say whether he had wilfully secluded himself from a creditor.

A CREDITOR having called for money, and the party denied, but was afterwards seen peeping over his wife’s shoulder; and, upon another occasion, upon a creditor’s coming, retired to the back part of the shop, and was denied:—

Held, that the jury were properly directed to consider whether he had *wilfully secluded* himself from a creditor, explaining it to them, or whether he withdrew himself from a part of his house where he was likely to meet his creditors, in a more retired part.

See 10 B. & C. 705.

6. *By suffering himself to be arrested for a Debt not due†.*

7. *By an Act of his Agent.*

HARWOOD v. BARTLETT, M. T. 1839. C. P. 6 B. N. S. 61; S. C. 8 Scott, 171.

An act of bankruptcy cannot be committed by the conduct of the trader’s agent.

A TRADER, with the fraudulent purpose of delaying his creditors for his own benefit, and that of the defendant, employed the defendant, as his agent, to procure purchasers for his goods, he himself retaining the goods, either in his own possession, or under his control, until they were delivered to those who purchased *bonâ fide*, and without knowledge of the fraud.

Held, that such sale by the trader was not an act of bankruptcy.

2nd.—*Such as relate to the Disposal of the Trader’s Property.*

1.—*By procuring Attachment, Sequestration, or Execution†.*

* The omission to keep a vague appointment, and settle accounts with a creditor, no hour being named, is not an act of bankruptcy. (*Lees v. Marton*, 1832, N. P., 1 M. & Rob. 210).

† A trader commits an act of bankruptcy by suffering himself to be arrested for a debt not due. (1 Jac. 1, c. 15; 6 Geo. 4, c. 16). So,

By yielding himself to prison. (7 Vin. Ab. 61).

By suffering himself to be outlawed. (1 Lev. Rep. 13; Sid. Rep. 69).

By procuring himself to be arrested. (7 Vin. Ab. 69).

By procuring any protection not being privileged by parliament, or taking sanctuary, was not an act of bankruptcy. (Skin. 21; but see 6 Geo. 4, c. 16).

But escaping from prison is an act of bankruptcy. (6 Geo. 4, c. 16, s. 5).

† A trader commits an act of bankruptcy by procuring attachment, sequestration, or execution. (6 Geo. 4, c. 16, s. 3).

2.—*By making, or causing to be made, either within the United Realm, or elsewhere, any fraudulent Grant or Conveyance of any of his Lands, Tenements, Goods, and Chattels*.*

1. *In General, and by whom.*

HUNT *v.* MORTIMER, M. T. 1829. K. B. 10 B. & C. 44.

A TRADER, to enable him to execute a large order for the East India Company, borrowed money, upon an agreement that the lender should receive the money for the order from the East India Company, and pay himself. The lender knew of the insolvency of the trader; and, upon his being afterwards arrested several times, the lender bailed him, and so enabled him to avoid committing an act of bankruptcy until after the money became due and was received by the lender.

To make a fraudulent preference there must be both an insolvency in the trader and a voluntary payment or transfer by him†.

The Court held, that this not being a voluntary payment, but made in discharge of the obligation of the contract, was not a fraudulent preference, and was therefore valid against the assignees.

BAXTER *v.* PRITCHARD, T. T. 1834. K. B. 3 N. & M. 638; S. C. 1 Ad. & E. 456—S. P. ROSE *v.* HAYCOCK, 1827. N. P. 3 N. & M. 644; S. C. 1 Ad. & E. 460.

TROVER by assignees of a bankrupt to recover the stock in trade of the bankrupt sold, previous to the issuing of the commission of bankruptcy, to the defendant. The sale was found by the jury to be bona fide on the part of the defendant, but fraudulent on the part of the bankrupt, who, immediately upon effecting the sale, absconded. At the trial it was contended that the circumstances amounted to an act of bankruptcy.

It is not an act of bankruptcy for a trader to sell his stock at a fair price, though he intended to abscond.

But the Court were of opinion, that the sale of a tradesman's stock to a bona fide purchaser, at a fair price, without any knowledge on the part of the latter of the fraudulent intention of the vendor, was not an act of bankruptcy.

SIMPSON *v.* SYKES, E. T. 1818. K. B. 6 M. & Selw. 295.

ACTION by assignees for money had and received, in respect of parcels of bills and cash handed over by the bankrupt in contemplation of bankruptcy and by way of undue preference.

The Court held, that it was no objection to the act of bankruptcy (the execution of a conveyance of all his effects to trustees for the benefit of his creditors) that it was made for the very purpose.

See Peake, N. P. C. 27.

But an assignment of effects is an act of bankruptcy, though purposely made with a view of being an act of bankruptcy.

* It is an invariable rule that any deed fraudulent against creditors within 13 Eliz., c. 5, or as against purchasers within the 27 Eliz., c. 4, and every fraudulent deed generally, is, in itself, an act of bankruptcy. (Doug. 92). But a preference of a creditor or creditors over others, is not fraudulent or void in a person not a trader. (See 5 T. R. 424; 3 T. R. 528; 4 East Rep. 1). So, a conveyance of all a person's property, who is not a trader, for the benefit of creditors, is valid. (3 M. & S. 371). And, by 6 Geo. 4, c. 16, such deeds are, for the first time, when executed abroad by traders, made acts of bankruptcy.

† An act of bankruptcy may be committed by a trader making a fraudulent delivery of goods. And fraud is established by shewing that no debt was due to the party, or that the delivery was voluntary and in contemplation of bankruptcy. (Parke, B.—*Scott v. Thomas*, M. T. 1834, N. P., 6 C. & P. 611).

ABBOTT v. BURBAGE, H. T. 1836. C. P. 2 *Bing. N. S.* 444; S. C. 2 *Scott*, 656.

A deed by partners conveying their jointestate to trustees for the benefit of joint creditors, if *bonâ fide*, is not an act of bankruptcy, though there be separate creditors.

A. & B., partners, having joint and separate creditors, became embarrassed and called a meeting of their joint creditors, with whom they entered into an arrangement by deed, by which they were to pay 4s. 6d. in the pound, at stipulated times, and they were to assign property, life policies, &c., to the defendants, as trustees for the joint creditors. The traders were also to retain the stock, debts, &c., and carry on their business for the purpose of enabling them to meet the instalments, upon the payment of which they were to be released from all responsibility; but if they failed in the performance, their liability was to remain until the whole was discharged. The separate creditors were no parties to this arrangement. The traders paid two instalments, but could not pay the third, upon which the defendants, trustees under the deed, possessed themselves of all the goods, effects, papers, &c. of the traders. A fiat was issued, on the petition of one of the private creditors of A., nearly two years after the date of the deed between the traders and the joint creditors. In trover, by the assignees under the commission, against the defendants, trustees to the deed, to recover the value of the life policy of A.—

The Court were of opinion, that the assignment from the traders to the joint creditors was not fraudulent with an intent to delay or defeat creditors; neither could it be said to be made in contemplation of bankruptcy, as its object was to enable the traders, by allowing them to retain their stock, &c., to continue their business.

2. *Of the Place where the Grant or Conveyance is executed*.*

3. *Of the Grant or Conveyance being under Seal†.*

4. *Of the whole of his Effects.*

BOTCHERLEY v. LANCASTER, E. T. 1834. K. B. 1 *Ad. & E.* 77; S. C. 3 *N. & M.* 383—S. P. DOE d. LLOYD v. POWELL, H. T. 1826. K. B. 5 *B. & C.* 308; S. C. 8 *D. & R.* 35.

An assignment by a trader, conveying his *whole* property for the benefit of his creditors is an act of bankruptcy, though the trustees do not execute it.

In trover, by the assignees of a bankrupt, to prove an act of bankruptcy, a deed of assignment of all the estate and effects of the bankrupt to trustees for the benefit of creditors was put in. It appeared that this deed had been executed by the bankrupt only a few days before the commission issued, and had not been executed by the trustees or creditors, nor had it in any way been acted upon.

Gurney, B., thinking this an act of bankruptcy, a verdict was found for the plaintiffs. On motion to set the verdict aside—

Per Cur.—The assignment was clearly an act of bankruptcy. To make it otherwise, we must intend that it was executed without any intention on the part of the bankrupt to deliver it. The verdict was right.

* By 6 Geo. 4, c. 16, s. 3, deeds executed abroad are acts of bankruptcy.

† The fraudulent preference need not be by deed under seal. It may be by gift, delivery, or transfer. (6 Geo. 4, c. 16, s. 3).

STEWART *v.* MOODY, H. T. 1835. Ex. 1 C. M. & R. 777.

TROVER by assignees. Plea: that, before A. B.'s bankruptcy, he assigned the goods and chattels to the defendants. Replication: setting out a deed, whereby the alleged bankrupt assigned all his property to the defendants, in trust to pay off a mortgage and afterwards to pay all his debts. It then alleged that he was a trader, that he was in embarrassed circumstances when he executed the assignment, which was fraudulently executed by him. At the trial, Gurney, B., decided that the deed was an act of bankruptcy, and the plaintiff had a verdict. On motion for a new trial—

And though he did not intend to delay his creditors, the act itself amounted to delay.

Per Cur.—It has been settled, beyond the possibility of argument, that if the necessary consequence of a man's act is to delay his creditors, he must be taken to enforce it; where he parts with all his property, and puts it into a different course of distribution from what the bankrupt laws direct, he commits an act of bankruptcy; therefore, this deed is clearly an act of bankruptcy.

SIEBERT *v.* SPOONER, T. T. 1836. Ex. 1 M. & W. 714; S. C. 1 T. & G. 1075.

A TRADER, Mitchell, conveyed all his effects and stock in trade to one of his creditors, in payment of an antecedent debt. Lord Denman, C. J., told the jury to say whether Mitchell had executed the deed fraudulently, with intent to defeat his other creditors, or not: because, unless it was executed fraudulently, it was not an act of bankruptcy. The jury found for the defendant. On motion for a new trial—

Without reference to the jury saying whether it be a fraudulent assignment or not*.

Per Cur.—It is perfectly well settled, that a conveyance of all the effects of a trader, or of all except a very small portion, is necessarily an act of bankruptcy without any actual fraud. There must be a new trial, because the question of fraud should not have been left to the jury.

5. Of Part only of his Effects.

BALME *v.* HUTTON, H. T. 1828. Ex. 2 Y. & J. 101; S. C. 3 M. & Scott, 1.

A. and B., being in embarrassed circumstances, conveyed to C. all the machinery in their mills, and all the machinery to be substituted in lieu thereof, to secure £3029. 9s., with interest, defeasible however upon the payment of that sum, with interest, by instalments of £50, in each succeeding month, but had other property.

The Court held, that this was not, *per se*, an act of bankruptcy; but that it should have been left to the jury to say whether the conveyance was a fraudulent preference.

An assignment of certain machinery only, not, upon the face of it, importing that it is an assignment of the whole of the bankrupt's property, is not *per se* an act of bankruptcy.

WEDGE *v.* NEWLYN, E. T. 1834. K. B. 4 B. & Ad. 831.

THE trader, a miller, had transferred by bill of sale to a creditor his waggon and horses. In trover, it was left to the jury to say,

So, the transfer of a trader's

* But, in another case it was decided, that the party who impeaches the sale of the whole of a bankrupt's property must shew some facts from which fraud may be inferred. (*Rose v. Haycock*, 5 Law Journal, K. B. 210).

goods is not an act of bankruptcy, unless it appears that insolvency would be the effect of the transfer.

whether he thereby conveyed away so much of his property as to incapacitate himself from carrying on his business by the insolvency which would ensue; and a verdict being found for the defendants,—

The Court refused a new trial, saying, to make the transfer of a trader's goods an act of bankruptcy, it must be shewn that insolvency would be the effect of the assignment.

CARR v. BURDISS, M. T. 1834. Ex. 1 C., M. & R. 443; S. C. 5 Tyr. 136.

And an assignment by a trader of *part* of his effects to secure past as well as future advances is not an act of bankruptcy.

A TRADER, carrying on business as a soap and alkali maker, being indebted to his bankers to a large amount, assigned all his effects, stock in trade, machinery, &c., to them, to secure his then debt, and future advances, provided that he should continue in possession thereof until default made by him in payment of the balance which he might owe them after notice. Besides the property so assigned, he was possessed of some ships of large value, which were not included in that conveyance.

On the question, whether this was an act of bankruptcy? The Court held, the assignment was not an act of bankruptcy: to make it one, it must appear that the trader had assigned all his property, or so much of it as will prevent him from carrying on his trade, and here all his property was not assigned.

3.—*By making, or causing to be made, any fraudulent Gift, Delivery, or Transfer of any Goods or Chattels*.*

BEVAN v. NUNN, T. T. 1832. C. P. 9 Bing. 107; S. C. 2 M. & Scott, 132; *Semb.*—*Overruling* TUCKER v. BARROW, M. T. 1827. N. P. 1 M. & M. 137; S. C. 3 C. & P. 85.

A voluntary delivery of goods in satisfaction of a *bonâ fide* debt made in contemplation of bankruptcy, is an act of bankruptcy, though made more than two months before the issuing of the commission †.

THE jury found, that a certain lease and bills of exchange had been delivered by the bankrupt to the defendant, voluntarily and in contemplation of bankruptcy; but that such delivery took place more than four months before the issuing of the commission against him, and that such delivery was made in satisfaction of a *bonâ fide* debt. A verdict was found for the plaintiff. On motion for a nonsuit—

Per Cur.—By the 3rd section of the 6 Geo. 4, c. 16, the making any fraudulent gift, delivery, or transfer, of any part of a trader's goods or chattels, with intent to defeat or delay creditors, is for the first time declared to be an act of bankruptcy; such fraudulent transfer of part of his goods not being attended with the consequence of bankruptcy under the former statutes, unless it was a grant or conveyance by deed. When, therefore, the present statute makes the very transaction in question a substantive act of bankruptcy, we think it cannot be a just interpretation of the 31st section, to hold, that the effect and conveyance of this very act of bankruptcy should itself be made valid and protected by that clause.

* Is an act of bankruptcy, 6 Geo. 4, c. 15, s. 3.

† The fraudulent transfer of a bill of exchange to a creditor, is a fraudulent transfer of a chattel within the 5th & 6th Geo. 4, c. 16. (*Cumming v. Bailey*, H. T. 1830, C. P., 6 Bing. 363; S. C. 4 M. & P. 36. Abridged ante, p. 27).

4. *By fraudulent Surrender of Copyholds* *.

5. *Paying Petitioning Creditor more in the Pound than other Creditors* †.

3rd.—*Such as relate to the Trader's Circumstances or Credit.*

1. *By Petitioning Creditor filing an Affidavit in Court of Bankruptcy* ‡.

2. *By Debtor filing Declaration of Insolvency* §.

GARLICK v. SANGSTER, T. T. 1832. C. P. 2 M. & Sc. 68.

THE act of bankruptcy was a petition by the bankrupt to the Insolvent Court, dated 28th October, 1829, but not signed by him till after 4 o'clock in the afternoon of that day. An assignment of his effects to the provisional assignee of the Insolvent Court was executed in prison at the same time. After signing the petition, the bankrupt had nothing more to do with it, and it remained in the custody of the officer of that court. M. D., the officer, took the petition and assignment away with him, and brought them into the office the next day, the 29th, about 2 o'clock in the afternoon, and, in answer to the question when was the petition filed, said, he could not answer the question, but would state the practice of the Court. That, after it is signed, it is carried to the public officer in Lincoln's Inn Fields, attested, numbered, and handed to the officer of the town department, with whom it remains. That, in this case, he did not return to the office on the 28th of October, after the petition was signed; and, in consequence of the number of petitions, and the business occasioned thereby, he did not get to the office the following day before 2 o'clock, and could not, in consequence of the

To render the presenting a petition an act of bankruptcy under the 7 Geo. 4, c. 57, it must have been completed and in the hands of the proper officer.

* Is an act of bankruptcy, 6 Geo. 4, c. 16, s. 3.

† Is an act of bankruptcy, 6 Geo. 4, c. 16, s. 8.

‡ By 1 & 2 Vict. c. 110, s. 8, it is enacted, that "If any single creditor, or any two or more creditors, being partners, whose debt shall amount to £100, or upwards, or any two creditors, whose debts shall amount to £150, or upwards, or any three or more creditors, whose debts shall amount to £200, or upwards, of any trader within the meaning of the laws now in force respecting bankrupts, shall file an affidavit or affidavits in her Majesty's Court of Bankruptcy, that such debt or debts is or are justly due to him or them respectively, and that such debtor, as he or they verily believe, is such trader as aforesaid, and shall cause him to be served personally with a copy of such affidavit or affidavits, and with a notice in writing requiring immediate payment of such debt or debts; and if such trader shall not, within 21 days after personal service of such affidavit or affidavits and notice, pay such debt or debts, or secure or compound for the same, to the satisfaction of such creditor or creditors, or enter into a bond in such sum and with such two sufficient sureties as a commissioner of the Court of Bankruptcy shall approve of, to pay such sum or sums as shall be recovered in any action or actions which shall have been brought, or shall thereafter be brought, for the recovery of the same, together with such costs as shall be given in the same, or to render himself to the custody of the gaoler of the court in which such action shall have been or may be brought, according to the practice of such court, or within such time and in such manner as the said court or any judge thereof shall direct, after judgment shall have been recovered in such action, any such trader shall be deemed to have committed an act of bankruptcy on the 22nd day after service of such affidavit or affidavits and notice, provided a fiat in bankruptcy shall issue against such trader within two calendar months from the filing of such affidavit or affidavits, but not otherwise."

§ By 6 Geo. 4, c. 16, s. 6, a declaration of insolvency left at the Bankrupt Office is an act of bankruptcy.

numerous petitions, have numbered and attested it prior to the 30th of October, when it was handed to the officer of the town department, with whom it has remained ever since. The bankrupt was never discharged under the Insolvent Act.

Per Cur.—On the construction of the 10th sect. 7 Geo. 4, c. 57, we think, that the act of bankruptcy was not completed till the 29th October, at 2 o'clock, when M. D. took the petition and assignment to the office, where they were to be filed; but the sale under the execution was complete by 12 o'clock on that day. It is urged, that the petition was virtually filed as soon as M. D. had it in his possession; but, it is manifest, that he was not the person in whose custody it was to remain; for, after such an instrument is signed, he says it is carried to the public office in Lincoln's Inn Fields, attested, numbered, and handed over to the officer of the town department, with whom it remains; so that he does not consider it filed till it is carried to the office and delivered there.

See the *King v. Wade*, 1 B. & Ad. 861; and see 1 & 2 Vict. c. 10, s. 39, *infra*, note.

3. *By filing Petition to take the Benefit of the Insolvent Act*.*

4. *By lying in Prison after being arrested for Debt†.*

HIGGINS *v.* M'ADAM, II. T. 1829. Ex. 3 Y. & J. 1—S. P. MOSER *v.* NEWMAN, C. P. 6 Bing. 556; S. C. 4 M. & P. 333.

Lying in prison is an inchoate act of bankruptcy until the expiration of the time limited by the statute, and can take no effect by relation ‡.

ACTION by plaintiffs, as assignees, for money had and received. The act of bankruptcy was committed by the bankrupt lying in gaol more than 21 days upon an arrest for debt. He was arrested on the 4th July, 1827, and remained in custody until the 5th, when he was taken to the county gaol, where he continued in prison until the commencement of the present suit. The action was brought to recover the proceeds of the stock, &c., of the bankrupt, seized under

* By 1 & 2 Vict. c. 110, s. 39, it is enacted, "that the filing of a petition of any person in actual custody, who shall be subject to the laws concerning bankrupts, and who shall apply by petition to the Court for his discharge from custody according to the act, shall be accounted and adjudged an act of bankruptcy from the time of filing such petition; and that any fiat issuing against such person, and under which he shall be declared bankrupt, before the time appointed by the Court, and advertised in the London Gazette, for such prisoner to be brought up to be dealt with according to the act, at any time within two calendar months from the time of making any such order as aforesaid, whether upon the petition of such prisoner, or the petition of any such creditor as aforesaid, shall have the effect of divesting the real and personal estate and effects of such person out of the said provisional assignee; provided always, that the filing of such petition shall not be deemed an act of bankruptcy, unless such person be so declared bankrupt before the time so advertised as aforesaid, or within two calendar months after; and that every such order shall be good and valid, notwithstanding any fiat in bankruptcy under which such person shall be declared bankrupt after the time so advertised as aforesaid, and after the expiration of two calendar months as aforesaid." (See 7 Geo. 4, c. 57, s. 13).

† By 6 Geo. 4, c. 16, s. 5, lying in prison for debt or non-payment of money for 21 days is an act of bankruptcy.

The whole of the day of the arrest may be included in the computation of the time. (*Saunderson v. Gregg*, 1824, N. P., 3 Stark. 72).

‡ A party having during the interval of imprisonment the day rules, and seen once at his shop, would prevent the act of bankruptcy. (*Soames v. Watts*, T. T. 1824, N. P., 1 C. & P. 400. See *Stevens v. Jackson*, 4 Campb. 164).

Quære, whether the 21 days have relation back to the first day of the imprisonment. (*Tucker v. Barrow*, M. T. 1827; 3 C. & P. 85; 1 M. & M. 137.)

a fi. fa. on the 3rd July, and partly sold on the 23rd. The Court held, that the act of bankruptcy, by lying in prison 21 days, is inchoate, and in progress only, until the party has lain in prison that time, and until the expiration of the time no act of bankruptcy is complete, nor can take effect by relation.

MOSER v. NEWMAN and BOOLE, E. T. 1830. C. P. 6 *Bing.* 556; S. C. 4 *M. & P.* 333.

On the 12th September, 1827, the bankrupt executed a warrant of attorney to the defendant, B., for the securing the payment of a sum of £500, then advanced to the bankrupt; the warrant of attorney was duly filed, and judgment was entered up by nil dicit, on the 16th January, 1828, on which day a writ of fi. fa. was issued, directed to the sheriff of D., endorsed to levy £512. 18s. 1d., returnable on Wednesday, the 27th. On Friday, the 18th, the writ was delivered to the sheriff, who then seized under it goods belonging to the bankrupt; and, on the 22nd commenced selling the property, and continued such sale up to and on the 25th of the same month, when the last of such goods were sold. The proceeds remained in the hands of the sheriff until the 28th August following, when they were paid over to the defendant, B.

The act of bankruptcy, by lying in prison, under 6 Geo. 4, c. 16, has no relation to the first day of the imprisonment.

The bankrupt was detained in custody of the defendant, Newman, as sheriff of D., for debt upon mesne process, on and from the 23rd July, 1828, for 21 days and upwards then next following. On the 14th July, 1828, a commission issued against the bankrupt; and, on the 18th of that month, notice was given to the sheriff of its having issued, and that all the bankrupt's effects seized by the sheriff, and then in his hands, were claimed under the commission.

Per Cur.—The act of bankruptcy is not complete until the expiration of the 21 days. There must be a detainer for that period to complete the act of bankruptcy. The case of *Hill v. Shish** is open to much doubt. The imprisonment has not relation to the first day of such imprisonment.

5. *By Members of Parliament* †.

III. OF THE PETITIONING CREDITOR.

(a) IN GENERAL.

MUSKETT v. DRUMMOND, M. T. 1829. K. B. 10 *B. & C.* 153.

PERSONS interested in supporting a commission, who sought to obtain the benefit of the 6 Geo. 4, c. 16, s. 18, presented a petition to the Lord Chancellor on the terms of that section, and obtained by consent an order, directing the commissioners to make the necessary inquiry as to the debt proposed to be substituted for that of the petitioning creditor, and, in case they found it sufficient, directed the commission to proceed. But it did not appear in terms, that the petitioning creditor's debt had been found insufficient to support a commission. The Court held, that, without such finding, the order was inoperative.

Under the 6 Geo. 4, c. 16, as to substituting a new debt, it is necessary that the original debt should be found insufficient.

* 2 Show, 514.

† See 6 Geo. 4, c. 16, ss. 9, 10, 11.

KEY *v.* COOK, M. T. 1830. C. P. 2 M. & P. 720.

The deposition when produced under 90th sect. 6 Geo. 4, c. 6, must shew on the face of it a good petitioning creditor's debt.

Per Cur.—IN actions by or against the assignees, if no notice of disputing the commission have been served in the manner directed by the statute, the deposition of the petitioning creditor as to his debt filed among the proceedings is to be deemed sufficient evidence of the debt therein stated, 6 Geo. 4, c. 16, s. 90. But it is still open to the Court to consider, whether the debt there stated be in law a good petitioning creditor's debt or not.

BURBIDGE *v.* WATSON, M. T. 1829. N. P. 4 C. & P. 170.

Where the act of bankruptcy is a conveyance by the bankrupt, to which the petitioning creditor is a party, it cannot be set up in support of the assignees' demands.

THE bankrupt executed an assignment of all his property to two trustees, one of whom was afterwards the petitioning creditor.

Held, that, as a *bonâ fide* transaction, it was no act of bankruptcy, as a fraudulent assignment, within the 6 Geo. 4, c. 16, s. 3; and the knowledge of it, therefore, by a creditor, before payment to him, not notice of an act of bankruptcy, to invalidate the payment, nor entitled the assignees to recover it back.

See 1 M. & S. 583, and 2 & 3 Vict. c. 29.

(b) WITH REFERENCE TO HIS PERSON*.

1. *Companies, Public†.*2. *Composition, Parties to Deed of.*SMALL *v.* MARWOOD, H. T. 1829. K. B. 9 B. & C. 300; S. C. 4 M. & R. 181.

A composition deed, though only two out of four trustees execute it, is binding upon those trustees who sign, and precludes them from petitioning.

AN insolvent, by composition deed, assigned his property to four trustees, upon trust to pay his creditors rateably, and the creditors thereby covenanted, that they would not implead the insolvent or his goods.

The Court held, that, although but two out of the four trustees executed the deed, it was nevertheless a valid deed; and that the debts of the trustees who executed were thereby extinguished, and could not be a good petitioning creditor's debt.

* An alphabetical list of the persons, who may or may not petition, may be useful:—

Alien. A person resident in England, in partnership with other British subjects residing in an enemy's country, cannot petition. (3 B. & P. 113).

Assignees of bankrupt, may. (4 Taunt. 741).

Attorney and Solicitor, may. (11 Ves. 163; 16 Ves. 166).

Baron and Feme. The husband, alone, cannot, for a debt due to the wife *dum sola*. (1 M. & S. 176).

Execution, persons who have their debtors in, cannot. (8 T. R. 123). But that does not apply to a *fi. fa.* (4 Esp. N. P. 194).

Executor and Administrator, may. (7 Taunt. 147; 2 Marsh. 425).

Factor, may. (4 Campb. 195).

Guardian and Infant, may. (1 Chit. B. L. 444).

Parish Officers, may. (1 Atk. 111).

Partner, may; but all must join. (1 Taunt. 477; 1 Stark. 145).

Uncertificated Bankrupt, may, if his assignees do not interfere. (2 Rose, 230).

† Authority to a company to sue and be sued in the name of a secretary, does not authorize him to sue out a commission. (*Guthrie v. Fiske*, M. T. 1823, K. B., 3 B. & C. 178; S. C. 5 D. & R. 24; S. C. 3 Stark. 151).

3. Mortgage*.

(c) WITH REFERENCE TO HIS DEBT.

1. As to the Amount†.

BYERS v. SOUTHALL. M. T. 1839. C. P. 6 Bing. N. S. 39; S. C. 8 Scott, 238.

ON demurrer, the pleadings raised the question whether, after adjudication, if the debts of the petitioning creditors are found insufficient to support a commission under the 18th section of the 6 Geo. 4, c. 16, it is sufficient to add other creditors who have proved debts to those of the old petitioners.

If the petitioning creditor's debt be not sufficient, any other creditor's debt may be added.

Per Cur.—For the purpose of supporting this demurrer, an attempt has been made to put a meaning on the words of the statute, (sect. 18), which they will not bear. The words are, “That, if after adjudication, the debt, &c., of the petitioning creditor or petitioning creditors, or any of them, be found insufficient to support a commission, it shall be lawful for the Lord Chancellor, upon the application of any other creditor or creditors,” &c. The words, “any other,” mean the addition of different creditors to those who first petitioned. For the purpose of putting a proper construction upon the words, it is not necessary that creditors altogether new should be substituted, and that the first set should be as if entirely expunged.

2. As to the time when contracted‡.

3. As to its particular Species §.

1. When due on Bills and Notes.

GILES v. POWELL, H. T. 1826. N. P. 2 C. & P. 259.

THE petitioning creditor's debt was on two bills of exchange, to the amount of 124*l.*, of which the petitioning creditor was the

When the bankrupt is the

* Mortgage money made payable six months after notice, the notice not to expire before a day certain, constitutes a good petitioning creditor's debt to sustain a commission issued before that day. (*Hill v. Harris*, M. T. 1830, N. P., 1 M. & M. 448).

† By 6 Geo. 4, c. 16, the single or partnership debt must amount to 100*l.*; or, if two distinct creditors petition, 150*l.*; and, if three or more creditors, 200*l.*

A sufficient debt, existing at time of act of bankruptcy and at time of issuing commission, suffices, though, in the interim, payments may have been made more than sufficient to discharge the balance due at the time of the act of bankruptcy. (*Shaw v. Harvey*, T. T. 1830, N. P., 1 M. & M. 526).

‡ The existence of the petitioning creditor's debt on the specific day must be shewn; proving continuing and fluctuating debts is of no avail. (*Gresly v. Price*, T. T. 1825, N. P., 2 C. & P. 48). And debt arising from indorsing or accepting bills, must be shewn that they were indorsed or accepted before the act of bankruptcy. (*Cowie v. Harris*, M. T. 1827, N. P., 1 M. & M. 141). But discontinuing trading after contracting of debt, does not prevent the obtaining a fiat, if debt was contracted during the trading. (*Doe d. Barraud v. Lawrence*, M. T. 1825, N. P., 2 C. & P. 134).

§ When due on an account stated, will support a petition, though not liquidated. (2 Ves. 236).

When due on agreements, will support a petition, if the credit has expired. (5 Taunt. 338; 1 Campb. 335).

When due on annuity, will support a petition. (1 Peters. Ab. 709).

When due to apprentices, will not support a petition. (1 Atk. 149). May be proved. (6 Geo. 4, c. 16).

When due on an award, will support a petition. (1 Gow, N. P. C. 19).

drawer of a bill, the dishonour by the acceptor must be shewn to constitute a petitioning creditor's debt.

holder, the bankrupt being the indorser of both and the drawer of one of them. The handwriting of the bankrupt to both was proved.

Per Best, C. J.—If the acceptor makes default, the drawer becomes liable; but, unless I am shewn some authority to warrant it, I shall not hold that the drawer or indorser is liable without a default of the acceptor being proved.

POOLEY *v.* MILLARD, E. T. 1831. Ex. 1 C. & J. 411; S. C. 1 Tyrw. 331.

If the bill on which the petitioning creditor's debt is founded be lost, after the making of the deposition, parol evidence of the contents may be received on the trial.

ON opening the commission, the debt of A., the petitioning creditor, was established on two bills of exchange, one of which was dishonoured and the other not due, when the adjudication took place. The running bill was lost immediately afterwards, the commission being disputed at law by a party whom the assignees sued in trover.

The Court held, that it was sufficient to prove the existence of the petitioning creditor's debt (giving secondary evidence of the bill) at the date of the commission, though it was contended that it ought to exist at the commencement of the action; whereas A., at that time, could not have recovered at law, as the bill might be in the hands of a *bonâ fide* holder.

See 7 B. & C. 90; 4 B. & A. 67.

2. *When due on a Check.*

BLEASBY *v.* CROSSLEY, H. T. 1826. C. P. 3 Bing. 430; S. C. 11 Moore, 327; S. C. 2 C. & P. 213.

Proving the giving a check to the bankrupt by the petitioning creditor,

THE petitioning creditor having given a check on his banker to a person who afterwards became bankrupt, and such petitioning creditor being appointed one of his assignees, and became possessed of his papers, produced the check—

When due on a bond, will support a petition; but if joint, all the obligees must join. (1 Taunt. 477; 1 Campb. 473).

When due on a charter-party, will support a petition, if for a sum certain. (Cullen, B. L. 107).

When due on contingent debts, will not support a petition. (1 G. & J. 102).

When due on a covenant, will support a petition, if for a sum certain; but not, if mere damages. (Cullen, B. L. 107).

When due for damages, will not support a petition. (1 Atk. 151).

When due on equitable claims, will not support a petition. (2 Ves. 407).

When due on gaming transactions, will not support a petition. (9 Anne, c. 14).

When due for goods sold, &c., will support a petition, though no price be agreed on. (Doug. 167).

When due for interest, will support a petition. (1 Atk. 150).

When due on a judgment, will support a petition. (1 Chit. Rep. 16).

When due for a legacy, will support a petition. (2 Rose, 413).

When due on a mortgage, will support a petition. (M. & M. 448).

When due for torts, will not support a petition. (1 Atk. 151).

When due on an unliquidated account, will support a petition. (2 Ves. 236).

When due on usurious contracts, will not support a petition. (1 Cooke, B. L. 214).

When due on a verdict, if for damages, will not support a petition before judgment. (14 East, 197).

When due on wagers will not support a petition. (9 Anne, c. 14).

When due on a warrant of attorney, will, it seems, support a petition. (4 Esp. N. P. 196).

Per Cur.—All that is proved in favour of the presumption of payment is, that the check was delivered by the petitioning creditor to the bankrupt; and as the former became possessed of the papers belonging to the latter, there was no evidence of payment. It did not even appear that the check in question ever came into the hands of the bankrupt's bankers. And, in order to identify it so as to make it evidence of the petitioning creditor's debt, the clerk who paid it ought to have been called; or, at all events, it should have been shewn that it was received by the bankers of the bankrupt.

without evidence of its being paid, will not suffice.

3. *When due on a Debt barred by the Statute of Limitations.*

GREGORY v. HURRILL, E. T. 1826. K. B. 5 B. & C. 341; S. C. 8 D. & R. 270; see S. C. 8 Moore, 138.

IN December, 1811, the plaintiff, being abroad, became indebted to A., who afterwards became bankrupt. His assignees, in 1812 and 1813, issued writs; but the writs were not returned or taken away from the sheriff's office. In 1814, the plaintiff was in the Downs and went several times to Deal, but A.'s assignees did not know of it. In 1819, the plaintiff came and resided in England. In 1821, A.'s assignees struck a docket against the plaintiff in respect of the debt for which the writs had been issued, and the plaintiff was declared bankrupt.

A debt barred by the Statute of Limitations is not a valid debt to sustain a commission*;

The Judges certified that A. had not a good petitioning creditor's debt at the time of suing out the commission.

See 5 B. & A. 489; 3 B. & B. 212; 1 Bing. 324.

MAVOR v. PYNE, M. T. 1825. C. P. 3 Bing. 285; S. C. 11 Moore, 2; S. C. 2 C. & P. 91.

ACTION for goods sold by bankrupt. On proving petitioning creditor's debt, it did not appear that the whole of his debt had been contracted within six years before commission issued. The jury found a verdict for the plaintiff.

but a debtor to a bankrupt, when sued by his assignees, cannot set up the Statute of Limitations as an objection to petitioning creditor's debt.

Per Cur.—The case of *Quantock v. England*, (3 Bur. 2628), is decisive to shew that such an objection cannot be taken by a third person, where the bankrupt submitted to the commission; and that case was confirmed by the Lord Chancellor in *Ex parte Dauncy*, (5 Ves. 490), where the subsequent case of *Fowler v. Brown*, (1 Cooke, B. L. 13), was relied on, which his Lordship considered as a mere *Nisi Prius* decision, and not tending to overthrow the unanimous judgment of the Court in *Quantock v. England*. Here, therefore, it is not open to the defendant, as a debtor to the bankrupt, to say that the plaintiff cannot recover, in his character of assignee, on the ground that the petitioning creditor's debt was barred by the Statute of Limitations, and more particularly so, as the bankrupt himself has not disputed it, or sought to set aside the commission on that ground.

* Unless a writ has been duly issued and continuances entered. (*Gregory v. Hurrill*, 1 Bing. 324).

4. When due on an I. O. U.

WRIGHT v. LAINSEN, T. T. 1837. Ex. 2 M. & W. 739.

To make an I. O. U. a good petitioning creditor's debt, its date is not sufficient; it must be shewn to have existed before the fiat.

IN this case, to prove the petitioning creditor's debt, certain I. O. U.'s, in the handwriting of the bankrupt, but in the possession of the petitioning creditor, to prove the petitioning creditor's debt, were produced. It was contended, that the I. O. U.'s were admissible as evidence of the debt of the petitioning creditor; there were three of them, and they all bore date before the bankruptcy.

Sed per Cur.—The date will not do; they must be shewn to have been in existence previously to the bankruptcy; although they are dated before it, they might have been given afterwards.

(d) WITH REFERENCE TO HIS PRIVILEGES*.

(e) WITH REFERENCE TO HIS DUTY AND LIABILITY†.

HORNIDGE v. ENGLAND, M. T. 1835. C. P. 2 Scott, 357.

A consent by a petitioning creditor to the first monies under the fiat being applied not to the expenses of the fiat, is binding.

THE petitioning creditor assented to the appropriation of the first monies received under the fiat to a different purpose than the payment of the expenses.

The Court held, that he was estopped from objecting afterwards that the directions of the statute 6 Geo. 4, c. 16, had not been complied with.

GARDNER v. MOULT, T. T. 1839. Q. B. 2 P. & D. 403; S. C. 10 Ad. & E. 464.

Depositions made by a witness of a petitioning creditor's debt before the commissioners, are evidence in an action against the petitioning creditor.

IN an action by the assignees of a bankrupt against the petitioning creditor, the defendants having employed an attorney to sue out a fiat of bankruptcy against one Stratton, they produced before the commissioners one Ray, who proved the defendants to be entitled to become petitioning creditors.

The Court held, that Ray's depositions taken before the commissioners were, as against the defendants, admissible as evidence of the act of bankruptcy, of the time of its taking place, and of the petitioning creditor's debt.

* The petitioning creditor is protected from arrest while attending the court of commissioners, eundo, morando, et redeundo, and it lies on the other party to shew that he is not in the due exercise of the privilege. (*Selby v. Hills*, H. T. 1832, C. P., 1 D. P. C. 257; 1 M. & Scott, 253; 8 Bing. 166. Abr., ante, tit. *Arrest*).

† The petitioning creditor is pledged to the validity of the commission, and to every act necessary for its preservation. (2 Rose, 188; Id. 386). The petitioning creditor should be assistant to the commission in all its stages. (2 Rose, 386). The petitioning creditor must attend personally to prove his debt; (*Lord Rosslyn's Order*, 1798); which also requires him to attend at the opening of the commission. (17 Ves. 413). And he must furnish the assignees with the requisite evidence to support the commission. (2 Rose, 188). And the 5 Geo. 2, c. 30, and 6 Geo. 4, c. 16, enact, that the creditors or creditor who shall petition for and obtain any commission of bankrupt, shall, and he is and they are hereby obliged, at his, her, or their own costs and expenses, to sue forth and prosecute the same until an assignee or assignees shall be chosen of such bankrupt's estate and effects; and the commissioners to be named in such commission shall, at the same meeting which shall be appointed for the choice of assignees, ascertain such costs, and, by writing under their hands, shall direct and order the assignee or assignees of such bankrupt's estate, who is and are hereby required to pay and re-imburse such petitioning creditor or creditors such his, her, or their costs and charges, as aforesaid, out of the first monies or effects of the said bankrupt that shall be got in and received under the said commission.

(f) WITH REFERENCE TO THE EFFECT OF BEING.

LEDBETTER v. SALT, E. T. 1828. C. P. 4 *Bing.* 623; S. C. 1 *M. & P.* 597.

THE defendant sued out a commission of bankruptcy against A., which he afterwards superseded, upon the assignment of certain property to him; thereupon, another creditor sued out a commission, founded on the assignment constituting an act of bankruptcy. In an action by the plaintiff, as assignee, against the defendant, for the property so assigned, he gave notice to produce the proceedings in bankruptcy. The writ of supersedeas being produced, in order to prove the issuing of the first commission, and also the defendant's affidavit on which it was founded, it was objected to, on the ground that the proceedings themselves should have been produced. But *Tindal, C. J.*, was of opinion that the defendant was not in a situation to dispute the issuing of the commission which had been obtained on his affidavit.

Being petitioning creditor excludes the party from afterwards contesting the fiat.

And the Court, on motion for a nonsuit, approved of that ruling. See 1 *Moore*, 300; 1 *Taunt.* 577; 15 *Ves.* 426, 474.

(g) WITH REFERENCE TO SECURITIES GIVEN FOR HIS DEBT.

ROSE v. MAIN, M. T. 1834. C. P. 1 *Bing. N. S.* 357; S. C. 1 *Scott*, 127.

THE plaintiff, being the petitioning creditor and assignee of the defendant, a bankrupt, took, in the interval between the suing out the commission and the granting of the certificate, a bill of exchange, payable at twelve months, by way of security for a portion of his debt, and proved for the residue under the commission. In an action on the bill of exchange, a verdict was found for the plaintiff, subject to a nonsuit. On motion for that purpose—

A bill of exchange given to a petitioning creditor as a security for his debt, is void under 6 Geo. 4.

Per Cur.—By 6 Geo. 4, c. 16, s. 8, it is enacted, “That, if any such trader, liable by virtue of this act to become bankrupt, shall, after docket struck against him, pay to the person or persons who struck the same, or any of them, money, or give or deliver to any such person any satisfaction or security for his debt, or any part thereof, whereby such person may receive more in the pound than the other creditors, such payment, gift, delivery, satisfaction, or security, shall be an act of bankruptcy, &c. And every person so receiving such money, gift, delivery, satisfaction, or security, shall forfeit his whole debt, and also repay or deliver up such money, gift, &c., or the full value thereof, to such person or persons as the commissioners, &c. shall appoint.” It is however said, that the present case, where the security was given by the bankrupt in the interval between the issuing the commission and the obtaining the certificate, was not within the contemplation of the legislature. But, in our opinion, when we take into consideration the grounds on which the legislature framed the statute, the receiving of a security for a sum of money within such interval of time, is a much stronger circumstance than if it was received before. We are therefore of opinion, that this case is within the contemplation of the legislature, and within the precise mischief pointed at by the 8th section.

(h) WITH REFERENCE TO THE SUBSTITUTION OF ONE DEBT FOR ANOTHER*.

IV. PROCEEDINGS UNDER THE COMMISSION BEFORE STAT. 1 & 2 WILL. 4, c. 56.

(a) STRIKING THE DOCKET.

1. *Practice* †.
2. *The Affidavit* ‡.

3. *Of the Act of Bankruptcy.*

MAGGS v. HUNT, E. T. 1827. C. P. 4 Bing. 212; S. C. 12 Moore, 357.

An act of bankruptcy before

THE act of bankruptcy was committed on or about the 6th June, 1825, by the bankrupt, Follett, absenting himself from his dwelling-

* The substitution of one petitioning creditor's debt for another, under 6 Geo. 4, c. 16, s. 18, is established by shewing the petition to the Chancellor—the order referring the sufficiency of the debt, &c., to the commissioner, and the commissioners finding thereon. (*Tindal, C. J.—Batchelor v. Vyse*, H. T. 1834, N. P., M. & Rob. 331).

† The course to be pursued by a creditor, desirous of suing out a commission, is to search at the bankrupt office if a docket has been struck; for this purpose all solicitors of the Court of Chancery may, from ten in the morning till three in the afternoon, and from six until eight in the evening, have free access to the docket-book, upon payment of 1s. (Order, 29th December, 1806, and 13th April, 1816); but though the order mentions only solicitors, yet any person may sue out a commission. (19 Ves. 473). If no docket has been struck, the petitioning creditor, in case he resides wholly in the country, attends before a Master Extraordinary in Chancery, and makes an affidavit of the amount of his debt, and that he believes the debtor is become a bankrupt, and executes a bond. These documents are sent to an agent in London. If the petitioning creditor reside in town, or its vicinity, he must make his affidavit before a Master in Chancery, and the bond will not be received unless it be executed at the bankrupt office. When the affidavit and bond are delivered at the bankrupt office, an entry is made in what is called the docket-book, upon which the petitioning creditor is said to have struck a docket. (By Lord Erskine's Order, 29th December, 1806, no docket shall be considered as struck, until it is entered in the docket-book). After a docket is so struck, the solicitor, within the next four days, bespeaks a commission. He then pays the fees for it, and the clerks make out a petition, (no petition being now carried to the bankrupt's office as formerly), and procure a commission from the office of the patentee. The petition and the commission are tacked together, and at one corner of the petition, the fiat is written directing the commission to issue. They are then taken together to the Chancellor, who signs the fiat. The commission should be immediately afterwards sealed, either at a private or a public seal. The commission always bears date the day it is sealed.

‡ The two principal parts of the affidavit are:—1st. The statement of the truth of the petitioning creditor's debt, which is rendered necessary by the 3 Geo. 2, and 6 Geo. 4;—and 2nd, that the deponent believes that the person against whom the docket is struck is a bankrupt. The latter allegation is not required by any statute, and is merely a salutary practice adopted by the Great Seal. (14 Ves. 38).

The affidavit need not state the particulars by which the trader became indebted. (1 Atk. 153). Hence, if the affidavit import that it is a debt on a simple contract, when, in fact, it is a judgment debt, the variance affords no ground for a supersedeas. (1 Beames, 214; 1 V. & B. 201; 2 Rose, 2). Those who, in striking a docket, swear to their belief, that an act of bankruptcy has been committed, should be able to assign some solid reason for that belief. (10 Ves. 167). The affidavit should not be prematurely made; (6 Ves. 431); for if the act of bankruptcy to which the creditor deposes upon striking the docket is a prospective one, as by the debtor lying in prison two months, which is not complete when the affidavit is sworn, it has been said that this would amount to perjury. (1 Beames, 53).

house, and the commission was not sued out until the 8th of September following.

Per Cur.—The stat. 6 Geo. 4, c. 16, s. 1, repealed all former acts relating to bankrupts; but by the last section, viz. the 136th, that statute was not to take effect before the 1st September, 1825. Although, therefore, all further statutes were repealed by the 1st section of 6 Geo. 4, still its general operation was to be suspended by the last, and, taking the two sections, the act in question did not come into operation until the 1st September, 1825; and here the commission was not issued until the 8th, which was then founded on an act of bankruptcy in June preceeding. Now we are of opinion, that there was no act of bankruptcy on which the commission could be supported, as all the previous statutes were entirely got rid of on the 1st September, 1825, and the act in question was not in force at the time the act of bankruptcy was committed.

the 6 Geo. 4, c. 16, came into operation, will not support a commission issued afterwards.

4. *Of the Bond**.

5. *Time of striking the Docket*†.

6. *Consequences of improperly striking the Docket*‡.

(b) ISSUING THE COMMISSION.

1. *Time of issuing the Commission*§.

2. *At whose Instance it might issue*||.

* By 5 Geo. 2, c. 30, and 6 Geo. 4, c. 16, s. 13, the petitioning creditor must give a bond to the Lord Chancellor to prove his debt, &c., which his Lordship may assign; this bond is also required by the 1 & 2 Will. 4, c. 56. Correctness of bond cannot be disputed at N. P. (*Folks v. Scudder*, 1824, N. P., 3 C. & P. 232). The bond cannot be given by an infant, nor can it be given by the solicitor to a commission issued by him. (3 Ves. 554). But it may be given by one of two partners; (1 Cooper, 99; 2 Rose, 172); or one of several assignees. (1 G. & J. 197). And the husband must give the bond, when husband and wife are petitioning creditors. (*Ramshay v. George*, 1 M. & S. 176).

It is not necessary that the bond and affidavit should bear the same date; and accordingly, in a joint affidavit, the amount of one of the debts being incorrectly stated, it was ordered that a supplemental affidavit should be made without a new bond. (1 G. & J. 365).

† By an order, the 13th April, 1816, it is directed, that no docket shall be struck but between ten in the morning and three in the afternoon, and between six and eight in the evening. And by another order, made 13th April, 1816, it is ordered, that no holidays are to be kept at the office, except Christmas-day, Good Friday, and days of general thanksgiving or fast.

‡ Striking a docket is justifiable only to prevent the bankrupt from wasting his effects before the commission, (1 Ves. jun. 157; 3 Ves. 349), and where there is a solid ground of belief of bankruptcy; (16 Ves. 167); and it is an abuse of the authority of the Great Seal to use a docket as the means of bartering for some arrangement. (18 Ves. 298; Buck, 360).

§ If the petitioning creditor do not, within four days next after the docket be struck, order a commission to be sealed, at the then next public seal, if there be a public seal within seven days next after the docket be struck, or by a private seal within eight days after the striking of such docket, and shall not cause the same to be sealed accordingly, any other person may issue a commission, without notice to the person who first applied. (Order, 29th December, 1806; 1 Mont. B. L. 76; Eden, B. L. 51). If there is a public seal-day on the fifth and on the seventh day, the commission must be sealed on the fifth day. (1 Rose, 258).

|| If the act of bankruptcy be valid, the commission may issue at the instance of the bankrupt. (*Shaw v. Williams*, M. T., 1824, N. P., 1 R. & M. 19).

3. *Description of the Bankrupt*, and Trading, in the Commission.*

BERNASCONI v. FAREBROTHER, H. T. 1830. K. B. 10 B. & C. 549; S. C. 5 M. & R. 364.

It is not necessary that the particular species of trading should be set forth in the commission.

LORD *Tenterden*, C. J., in the course of his judgment, said, "The use of the word 'bankers' only in this commission, without the words 'dealers and chapmen,' upon which an objection has been founded, presents, in reality, no difficulty at all; because that word is descriptive, *not* of the *trade* of the bankrupts, but of their *persons* only. The commission is awarded against them, as 'being traders according to the provisions of the statute,' which is a perfectly sufficient allegation of their being traders."

4. *Of awarding Commission †.*5. *Of altering the Commission, and of auxiliary and renewed Commissions ‡.*

(c) OF DECLARING THE BANKRUPTCY.

1. *Time allowed for prosecuting the Commission §.*
2. *Of opening the Commission ||.*
3. *Summons to surrender, and Warrant of Seizure ¶.*
4. *Notice in the Gazette **.*

* If a commission describe a bankrupt as a dealer in a particular article, evidence of another kind of trading is not admissible. (*Hale v. Small*, H. T. 1819, C. P., 3 Moore, 78; S. C. 8 Taunt. 730). But under the general description of the bankrupt getting his living by buying and selling, evidence of any kind of trading is admissible. (*Hale v. Small*, E. T. 1820, C. P., 2 B. & B. 25; S. C. 4 Moore, 415).

† Under 13 Eliz. c. 7, and 6 Geo. 4, c. 16, s. 12, on petition the Lord Chancellor awarded a commission, directed to certain commissioners therein named, who had full power to take the bankrupt's person, as well as his property real and personal.

‡ If there is any mistake in the commission, it may be rectified before it is opened; but the date cannot be altered, so as to let in a subsequent act of bankruptcy. And if the commission has been acted upon, it cannot be altered or resealed, though only to correct a clerical error. (13 Ves. 325; 1 Rose, 85, 228; 18 Ves. 480). By 6 Geo. 4, c. 16, s. 16, the Lord Chancellor might issue an auxiliary commission to receive proof of debt under 20^l. And by the same statute, s. 26, the commission might be renewed, and did not abate by death of bankrupt.

§ A London commission is supersedeable for want of prosecution at the expiration of fourteen days after the date, and a country commission at the expiration of twenty-eight days. (Order, 26th June, 1793; Cullen, B. L. 60; 1 Mont. B. L. 83). One day must elapse after the expiration of the last day before any order shall be made for a supersedeas, during which day any solicitor is to be preferred to the one who struck the docket. (Ib). (See Order, 17th November, 1793; 1 Mont. B. L. 83; Cullen, B. L. 61).

|| Until a commission has been opened, it is deemed an escrow. (1 Mont. B. L. 86). A commission which has not been opened may, with the consent of the petitioning creditor, be superseded. (1 Ves. & B. 348).

¶ After the bankruptcy is declared, the commissioners summon the bankrupt to surrender; (5 Geo. 2, c. 30, s. 1; 6 Geo. 4, c. 16, ss. 25, 112); the summons must be left at the bankrupt's usual place of abode, or be personally served if he is in prison. (6 Geo. 4, c. 16, s. 112; 5 Geo. 4, c. 30, s. 14). And by 5 Geo. 2, and 6 Geo. 4, c. 15, the commissioners may issue their warrant to the messenger to break open the bankrupt's doors, &c., and seize his body or property in England, Ireland, or any place where property is concealed; or in Scotland, where it must be signed by a judge.

** The commissioners, after the person is declared a bankrupt, must give notice

V. PROCEEDINGS UNDER A FIAT SINCE STAT. 1 & 2
WILL. 4, c. 56*.

thereof in the London Gazette, and appoint a time and place for the creditors to meet for the choice of assignees. (5 Geo. 3, c. 30, s. 25; 6 Geo. 4, c. 16, s. 25). The insertion of the notice, however, has been suspended upon an affidavit of solvency, and that no act of bankruptcy had been committed. (1 Rose, 387, 454).

* By 1 & 2 Will. 4, c. 56, s. 12, it is enacted, "That in every case wherein the Lord Chancellor, by virtue of any former act, hath power to issue a commission of bankrupt under the Great Seal, it shall and may be lawful for him, and also for the Master of the Rolls, the Vice-Chancellor, and each of the Masters of the Court of Chancery, acting under any appointment by the Lord Chancellor to be given for that purpose, on petition made to the Lord Chancellor against any trader having committed any act of bankruptcy, by any creditor of such trader, and upon his filing such affidavit and giving such bond as is by law required, to issue his fiat under his hand in lieu of such commission, thereby authorizing his creditor to prosecute his said complaint in the said Court of Bankruptcy, or to prosecute the same elsewhere, before such discreet and proper persons as the Lord Chancellor, or as the Master of the Rolls, Vice-Chancellor, or one of the Masters of the Court of Chancery, acting as aforesaid, by such fiat, may think fit to nominate and appoint, and that the persons so appointed shall thereby have the like power and authority, to all intents and purposes, as if they were assigned and appointed special commissioners by virtue of a commission under the Great Seal.

"And it is further enacted, That every such fiat prosecuted in the said Court of Bankruptcy, shall be filed and entered of record in the said Court, and shall thenceforth be a record of the said Court; and it shall thereupon be lawful for any one or more of the commissioners thereof to proceed thereon in all respects as commissioners acting in the execution of a commission of bankrupt, save and except as such proceeding may be altered by virtue of this act."

It will be perceived by the above statute, that the commission of bankrupt is abolished, and a fiat issues in lieu of the commission. The difference between the commission and fiat is, that the commission was addressed to certain persons named in the commission, being called commissioners of bankrupt. And these commissioners used to appoint provisional assignees, and make a provisional assignment of the bankrupt's property, to continue until the assignees were appointed by the creditors. The fiat, however, authorizes the creditor to prosecute his suit in the Court of Bankruptcy, or, if in the country, before some person duly authorized for that purpose. And no provisional assignment is essential, because, before 1 & 2 Will. 4, a commission did not pass the property until there was an assignment; but since that statute it vests in the official assignee.

The proceedings under the fiat are the same as the steps formerly adopted under a commission of bankrupt; consequently, to found a fiat, there must still be a trading, act of bankruptcy, and petitioning creditor's debt. A docket must be struck as ante, p. 42, upon an affidavit, and a bond given as ante, p. 43, when the creditor must prefer a petition, upon which the fiat issues. Any person may obtain a fiat: he need not be an attorney or solicitor. (19 Ves. Rep. 473).

By 1 & 2 Will. 4, c. 56, s. 16, it is enacted, "That all the laws and statutes, rules and orders, now in force relating to bankrupts, or to commissions of bankrupt, or to proceedings under such commissions, or to the subject-matters of such proceedings, or to the persons concerned therein or in any way affected thereby, shall in like manner extend and be construed to extend, in every respect, as far as the same may be applicable to this act, and to fiats issued in pursuance thereof, and to all proceedings under the same, and to all the subject-matters of such proceedings, and to all persons concerned therein, or in any way affected thereby, to all intents and purposes whatsoever, as if every such fiat were a commission of bankrupt under the Great Seal of the United Kingdom of Great Britain and Ireland, save and except as may be otherwise directed by this act."

And by s. 17, it is enacted, "That if any trader adjudged bankrupt shall be minded to dispute such adjudication, and shall present a petition praying the reversal thereof to the said Court of Review, such petition to be presented within two calendar months from the date of such adjudication, if such trader shall be then residing within the United Kingdom, or within three calendar months from the date aforesaid, if then residing in any other part of Europe, or within one year from the date aforesaid, if then residing elsewhere, or within such other time as the said Court shall allow, (not exceeding one year, to be computed from the

VI. OF COUNTRY FIATS * UNDER 1 & 2 WILL. 4.

date aforesaid), such Court of Review shall proceed to hear and decide on the said petition; or, at the option of the said bankrupt, and on his finding such security for costs (if the said Court shall think fit to require any security) as by the said Court shall be approved, shall direct an issue to try any matter of fact affecting the validity of such adjudication by a jury, to be duly impaneled and sworn for that purpose before the Chief Judge, or any one or more of the other Judges of the Court of Bankruptcy; and if the verdict on such issue shall not be set aside, on application made to the said Court of Review, within one month after the said trial, or if the adjudication of the commission shall not be set aside by the said Court of Review on the petition aforesaid, such verdict or such adjudication of the said commission shall, in all cases as against the said bankrupt, and also as against the petitioning creditor, and as against any assignee to be chosen of any bankrupt's estates and effects, and as against all persons claiming under the said assignees, and all persons indebted to the bankrupt's estate, be conclusive evidence that the party was or was not a bankrupt at the date of such adjudication, any other act, debt, or trading than the act, debt, or trading proved at such trial notwithstanding; provided always, that an appeal shall be to the Lord Chancellor from the decision of the said Court of Review, upon matter of law or equity, or on the refusal or admission of evidence only."

Sect. 18 provides, "That after any such issue shall have been tried as aforesaid, it shall and may be lawful for the Lord Chancellor, on petition to him to be presented within one calendar month after such verdict, and upon notice thereof to the bankrupt, upon special circumstances to be submitted to the said Lord Chancellor, to order that another fiat do issue at the instance of any other than the former petitioning creditor against the said bankrupt, and that such fiat shall and may be supported by any debt, trading, or act of bankruptcy, other than those given in evidence on the trial of such issue."

Sect. 19 enacts, "That it shall be lawful for the Lord Chancellor, upon the reversal of any adjudication of bankruptcy, or for such other cause as he shall think fit, to order that any fiat issued by virtue of this act shall be rescinded or annulled; and such order shall have all the force and effect of a writ of superseas of a commission according to the existing laws and practice in bankruptcy."

And by 2 & 3 Will. 4, c. 116, s. 5, it is enacted, "That all fiats already issued or hereafter to be issued in lieu of commissions of bankrupts, to be prosecuted elsewhere than in the said Court of Bankruptcy, and all adjudications of bankruptcy by the persons named in such fiats to act as commissioners, and all appointments of assignees and certificates of conformity, made and allowed under such fiat, may and shall be entered of record in the said Court of Bankruptcy, upon the application of or on behalf of any party interested therein, on the payment of the fees thereafter mentioned, without any petition in writing prescribed for that purpose; and that any one of the judges of the said Court may, upon petition, direct any deposition or other proceeding under such fiat to be entered of record as aforesaid.

"That no fiat issued or to be issued in lieu of a commission of bankruptcy, whether prosecuted in the Court of Bankruptcy or elsewhere, nor any adjudication of bankruptcy or appointment of assignees, or certificate of conformity under such fiat, shall be received in evidence in any Court of law or equity, unless the same shall have been first entered of record in the Court of Bankruptcy as aforesaid.

"Provided always, that upon the production in evidence of any commission, fiat, adjudication, assignment, appointment of assignees, certificate, deposition, or other proceeding in bankruptcy, purporting to be sealed with the seal of the said Court of Bankruptcy, or of any writing purporting to be a copy of such document, and purporting to be sealed as aforesaid, the same shall be received as evidence of such documents respectively, and of the same having been so entered of record as aforesaid, without any further proof thereof: provided, nevertheless, that all fiats, and proceedings under the same, which may have been entered of record before the passing of this act, shall and may, upon the production thereof, with the certificate thereon, purporting to be signed by the person so appointed to enter proceedings in bankruptcy, or by his deputy, be received in evidence of the same having been duly entered of record, anything herein contained notwithstanding."

* Though the trader reside in the country, yet if the major part of the creditors reside in London, a town fiat may be issued of course.

Leave must be obtained to issue a country fiat against a trader who has a resi-

VII. OF THE COMMISSIONERS.

(a) OF THE APPOINTMENT OF*.

(b) OF THE OATH OF†.

(c) OF THE COURT OF COMMISSIONERS‡.

dence in London. Where a bankrupt has houses of business at London and Manchester, the majority of creditors living at Manchester, an order is necessary to obtain a country fiat. It was not sufficient, upon an application to seal a fiat as a country fiat, for the affidavit to state that the major part in value of the creditors did not live within fifty miles of London, and that the major part of the creditors resided at a certain town in the country.

Country Fiats.—Country fiats issue only to places more than forty miles from London; and must, as it seems, be executed within ten miles of the place to which issued.

The 1 & 2 Will. 4, c. 56, s. 14, enacts, "That the Judges who go the several circuits in England and Wales may be directed by the Lord Chancellor, from time to time, to return to him the names of such number as he shall think fit to require, of barristers, solicitors, and attornies practising in the counties to the said circuits belonging, and upon such persons being returned and approved by the Lord Chancellor, the fiat or fiats aforesaid, not directed to the Court of Bankruptcy, shall be directed to some one or more of such persons in rotation to act as commissioners of bankrupt, according to the districts or places for which such person shall be so returned, and to no other person than such as shall be included in such return: provided always, that it shall be lawful for the Lord Chancellor, at any time, to remove any person from the lists to be so returned, for such cause as to him shall seem fit." In pursuance of this clause, lists, containing five commissioners each, have been appointed within various districts in the country, and to such lists all fiats to be worked within such districts are directed. Where no such lists exist the old practice is followed.

* By 1 & 2 Will. 4, c. 56, s. 1, the Court of Bankruptcy is empowered to appoint six persons, being barristers, to be commissioners. Before that statute the commissioners were very numerous, and there were five named in each commission.

With respect to the country commissioners, see *supra*.

† *Of London Commissioners.*—By 1 & 2 Will. 4, c. 56, s. 9, it is enacted, "That, in lieu of the oath directed to be taken by commissioners under the said recited act, every judge and commissioner to be appointed by virtue of this act shall, before he shall be capable of acting in the execution of any of the powers and authorities given in this act, take an oath before the Lord Chancellor, to the effect following, (that is to say):—'I, A. B., do swear, that I will faithfully, impartially, and honestly, according to the best of my skill and knowledge, execute the several powers and trusts reposed in me, (as the Chief Judge, or one of the Judges, or one of the Commissioners of Bankruptcy), and that without favour or affection, prejudice or malice. So help me, God.' And any judge or commissioner having once taken the said oath, shall not again be required to take the same so long as he shall continue in office."

Of Country Commissioners.—By 1 & 2 Will. 4, c. 56, it is enacted, "That, in lieu of the oath required by the said recited act to be taken by the commissioners of bankrupt, all persons acting as such commissioners elsewhere than in the said Court of Bankruptcy shall take an oath to the effect following:—'I, A. B., do swear, that I will faithfully, impartially, and honestly, according to the best of my skill and knowledge, execute the several powers reposed in me as a commissioner in a prosecution of bankruptcy against —, and that without favour or affection, prejudice or malice. So help me, God.' In country fiats, after the fiat is opened, and before the commissioners proceed to the execution of any of their powers, one or more of them must personally administer to each other this oath. A memorial, signed by the commissioner, of the oath, must be entered on the proceedings. Every act done by the commissioners is under the sanction of this oath. After the commissioners have qualified themselves by taking the oath, they proceed to examine on oath the proof of the petitioner's debt, the trading, and the act of bankruptcy.

‡ By 1 & 2 Will. 4, c. 56, s. 6, it is enacted, "That the said six commissioners may be formed into two subdivision courts, consisting of three commissioners for

(d) OF THE AUTHORITY OF *.

1. *Over the Bankrupt's Estate* †.2. *Over the Bankrupt's Person.*1. *To summon and arrest him* ‡.2. *To protect him from Arrest* §.

each court, for hearing and determining the matters and things, and making the examinations hereinafter referred thereto; and all references or adjournments by a single commissioner to a subdivision court, by virtue of this act, shall be to the subdivision court to which he belongs, unless the said commissioners, in case of the sickness of some one or more of the commissioners of such subdivision court, or other sufficient cause, shall think fit otherwise to direct; and the said subdivision courts may sit either in public or private, as they shall see fit, unless where it shall be otherwise provided by this act, or by the rules to be made as hereinafter mentioned."

* By 1 & 2 Will. 4, c. 56, s. 7, it is enacted, "That, in every bankruptcy prosecuted in the said Court of Bankruptcy, it shall and may be lawful for any one or more of the said six commissioners to have, perform, and execute all the powers, duties, and authorities by any act or acts of Parliament now in force vested in commissioners of bankrupt, in all respects as if they, or any one or more of them, were in every instance especially authorized and appointed for the purpose by a separate commission under the Great Seal of the United Kingdom of Great Britain and Ireland."

By sect 30, it is enacted, "That any one of the said six commissioners, if he think fit, may adjourn the examination of any bankrupt or other person, to be taken either before a subdivision court or the Court of Review; and may likewise adjourn the examination of a proof of debt, to be heard before a subdivision court, which said court shall proceed with such last-mentioned examinations, and finally, and without any appeal, except upon matters of law or equity, or of the refusal or the admissions of evidence, shall determine upon such proof of debts: provided always, that in case before the said commissioner, or subdivision court, both parties, the assignees, or the major part of them, and the creditors, consent to have the validity of any debt in dispute tried by a jury, an issue shall be prepared under the direction of the said commissioner or subdivision court, and sent for trial, before the Chief Judge, or one or more of the other Judges; and if one party only applies for such issue, the said commissioner or subdivision court shall decide whether or not such trial shall be had, subject to an appeal as to such decision to the Court of Review."

And by sect. 31, it is enacted, "That if such commissioner or subdivision court shall determine any point of law or matter of equity, or decide on the refusal or admission of evidence in the case of any disputed debt, such matter may be brought under the review of the Court of Review, by the party who thinks himself aggrieved, and the proof of the debt shall be suspended until such appeal shall be disposed of; and a sum not exceeding any expected dividend or dividends on the debt in dispute on such proof, may be set apart in the hands of the said accountant-general until such decision be made, and in like manner there may be an appeal on the like matter of law or equity from the Court of Review to the Lord Chancellor."

† By 13 Eliz. c. 7, and 6 Geo. 4, a general power over the personal and real property of the bankrupt is conferred on the Chancery court.

‡ Under the 6 Geo. 4, c. 16, s. 36, the commissioners may, whether the bankrupt has obtained his certificate or not, summon him; and in case of non-attendance authorize his arrest, to bring him before the commissioners.

A commissioner's warrant to arrest a bankrupt, addressed to "A. and B., or messengers and their assistants," does not authorize an arrest by C., not in the presence of A. or B.; and if death ensues to C. by an act of the bankrupt, it will be manslaughter only. (*Williams, J.—Rex v. Whalley, 1835, N. P., 7 C. & P. 245*).

§ By 5 Geo. 2, c. 30, and 6 Geo. 4, c. 16, the bankrupt was exempt from arrest after surrender for forty-two days, and such further time as should be allowed for finishing his examination. But since the 1 & 2 Vict. c. 110, no point can now arise as to mesne process.

3rd.—To examine him*.

4th.—To commit him†.

Ex parte ISAAC, H. T. 1829. Ex. 3 F. & J. 38.

A WITNESS summoned by commissioners, under the stat. 6 Geo. 4, c. 16, s. 33, being required to read certain entries in a book, to which, during his examination, he had referred, but which he had not been called upon to produce, refused to read the entries, whereupon he was committed for refusing to answer the "said question."

Per Cur.—Looking at the act of parliament, the commissioners have a plain line of duty marked for them. The particular clause which gives them jurisdiction, empowers them, in the event of a refusal to be examined or to produce documents, to commit the party refusing. Now, can it be said, that what has in this case been done comes under either of these branches of jurisdiction? The refusal is to read; and, supposing these entries were proper to be inspected, what power have the commissioners to compel the party to read? No distinct question is propounded to the witness, and how, therefore, can he be committed for refusing to answer, when, in fact, no question is asked of him?

See post, p. 51, *Isaac v. Impey*.

In re T. LEAK, H. T. 1829. Ex. 3 F. & J. 46; S. C. K. B. 9 B. & C. 234.

THE warrant of commitment did not set out the examination of the bankrupt, and concluded by committing him to prison, until he should full answer make, to their satisfaction, to such questions as should be put to him, and sign and subscribe such examination.

Per Cur.—The present warrant does not set out the examination; and it appears to us, that, where the ground of objection is to sign, and not to answer, the examination need not be set out. Upon the face of these proceedings, we must assume, that no valid objection was urged during the course of the examination, but that the only objection was to sign after the examination had properly terminated. We are not unaware, that it may be said, that the bankrupt had not at the time the power of resisting the examination; because the commissioners were, in the first instance, the sole judges of any objection that might have been urged. But that is not the ground upon which his refusal to sign proceeds, and, if any such objection had been taken, it might have been shewn to the Court on the present occasion.

On the second objection, namely, the form of the commitment, we have entertained considerable difficulty. We should have been better satisfied, if the term of his imprisonment had been limited to

Commissioners have no authority to commit for refusing to read certain entries.

The warrant of commitment of a bankrupt for not signing his examination need not set out the examination, but it should be until he shall have signed his examination, and not until he should full answer make.

* By 1 Jac. 1, c. 7; 5 Geo. 2, c. 30; and 6 Geo. 4, c. 16, s. 36, the commissioners are to examine the bankrupt, and put the examinations into writing.

† By 1 Jac. 1, c. 15; 5 Geo. 2, c. 16; and 6 Geo. 4, c. 16, bankrupt refusing to be sworn, or not fully answering, or to sign his examination, may be committed by the commissioners.

But by 1 & 2 Will. 4, c. 56, s. 7, it is provided, that no single commissioner shall have power to commit any bankrupt, or other person examined before him, otherwise than to the care and custody of a messenger or other officer of the said Court, to be by him detained in his custody, and brought up before a subdivision Court, or the Court of Review, within three days after such commitment, for which purpose one of such Courts shall be forthwith assembled, and to which Court such examination shall be adjourned. See *Rea v. Faulkner*, 16 M. & R. 525; S. C. 2 Mont. & Ayr. 311; and stat. 5 & 6 Will. 4, c. 29, s. 25,

the performance of that for which he was in fact committed; but we believe, upon consideration, that this objection may be answered, by observing that it is one of form merely, and that the substance of the warrant is, that he shall be committed, and detained in custody, until he shall sign his examination.

3. *Over the Bankrupt's Wife*.*

4. *Over the Witnesses.*

1st.—*To summon them†.*

2nd.—*To regulate the Payment of their Expenses‡.*

3rd.—*To protect them from Arrest§.*

4th.—*To examine them||.*

5th.—*To commit them¶.*

Ex parte BAXTER, H. T. 1828. 7 B. & C. 673; S. C. 1 M. & R. 572.

A witness cannot be committed for not answering as to belief of the intention of the bankrupt, unless parts of the examination shew such belief to be material with reference to the person, trade, dealing, or estate of the bankrupt.

THE prisoner had been committed by commissioners of bankruptcy for not answering questions propounded to him. It was admitted that some of the answers were not satisfactory; but they related to subjects upon which the commissioners had no right to examine the prisoner. It was contended, therefore, that nothing can justify the committing of the prisoner in respect of the answers to such questions. The questions themselves were unfair and irrelevant to the matter under inquiry.

Per Cur.—Taking the whole of the examination together, it is evident, that the prisoner was most unwilling to make a fair disclosure of the facts within his knowledge. To one of the questions relative to what passed at the interview with his broker, he answered negatively, having previously given a qualified affirmative. His whole purpose seems to have been to elude inquiry. But the answers to these latter questions do not appear to have been sufficient to warrant his commitment, and for this reason, the questions were as to his belief respecting the purpose of his broker in coming to Ipswich. Now, nothing appears on the examinations to shew that the pri-

* By 21 Jac. 1, c. 19, and 6 Geo. 4, c. 16, s. 37, the bankrupt's wife may be summoned and examined by the commissioners.

† By 3 Geo. 4, c. 81, and 6 Geo. 4, c. 16, commissioners, before adjudication, may summon persons to give evidence of trading and act of bankruptcy. And by s. 33 of the 6 Geo. 4, commissioners are empowered to summon persons suspected of having bankrupt's property, &c., in their hands, and to compel them to produce their books, &c.

‡ By 6 Geo. 4, c. 16, s. 35, the commissioner may allow such witness his costs and charges, as he may think fit.

§ A witness summoned by the commissioner is protected from arrest, *eundo, morando, et redeundo*. (See *Arding v. Flower*, 8 T. R. 535; *Kinder v. Williams*, 4 T. R. 377). And see 1 & 2 Vict. c. 110, abolishing arrest on mesne process.

|| By 1 Jac. 1, c. 15, 5 Geo. 2, c. 30, and 6 Geo. 4, c. 16, s. 34, the commissioners have power to examine witnesses summoned by them, and also to examine any person present at the meeting, and to compel witnesses to produce their books, papers, deeds, &c. &c.

¶ By 1 Jac. 1, c. 15, 5 Geo. 2, c. 30, and 6 Geo. 4, c. 16, s. 34, persons refusing to be sworn, or to answer, or not fully answering, or refusing to sign examination, or produce books, papers, &c., may be committed. But see 1 & 2 Will. 4, c. 56, ante, p. 49, note.

soner's belief was, in this respect, material towards any subject within the jurisdiction of the commissioners. What the prisoner believed on this point does not appear to have any reference to the person, the trade, the dealing, or the estate of the bankrupt. It might, for aught that we know, have had such a reference, and its materiality might have been made to appear by other questions. For these reasons, we are of opinion that the prisoner is entitled to be discharged.

GROOCKOCK *v.* COOPER, E. T. 1828. K. B. 8 *B. & C.* 211; S. C. 2 *M. & R.* 78.

THE defendants were the commissioners in a commission of bankrupt against Silvey and Sanderson, bankrupts. The commission was worked at Norwich. The plaintiff was a linen-draper, living in London. It being understood that the plaintiff could give material evidence touching the property and affairs of the bankrupts, he was served with a summons, in London, to appear before them at Norwich on the following day. He did not appear. He was, in consequence, apprehended under a warrant granted by the commissioners for his non-appearance.

Per Cur.—We are of opinion, that the defendants were not bound to have evidence on oath of the service of the summons, and the disobedience of the plaintiff thereto; but we think the question as to the reasonableness of the notice (that is, as to the time) should have been left to the jury; and as it was not so left, there must be a new trial on that ground.

Commissioners ought not to commit unless there be a reasonable interval between the service of the summons and the time appointed for the party's attendance.

Ex parte HARRISON, M. T. 1830. K. B. 1 *B. & Ad.* 410.

A WITNESS had been committed by commissioners under 6 Geo. 4, c. 16, s. 34. It appeared by the warrant, that the question had reference to one or other of the matters over which the commissioners had jurisdiction. This was holden sufficient, it being enough, if the questions appear in themselves to have been upon a matter which the commissioners had power to inquire into; and, upon looking into these examinations, it was obvious, that the questions had reference to such a matter.

See 1 *B. & C.* 163; 4 *C. & P.* 120.

If it appear upon the warrant of commitment, that the questions asked had reference to a subject-matter over which the commissioners had jurisdiction, it will suffice.

ISAAC *v.* IMPEY, H. T. 1830. K. B. 10 *B. & C.* 442; S. C. 5 *M. & R.* 377; S. C. 4 *C. & P.* 113.

A WITNESS being requested by the commissioners to read an entry in a ledger, and refusing to do so, was by them committed "for refusing to answer a question."

Per Cur.—The warrant of commitment states, that the plaintiff was committed for refusing to answer a question; the examination, on the contrary, shews, that the commissioners requested him to read certain entries in a book, and that he refused to do so. It is quite impossible to say, that the requesting the plaintiff to read those entries was, either in form or substance, putting a question to him; and if so, the commitment was clearly illegal.

See *Rex v. Faulkner*, 16 *M. & R.* 525; S. C. 2 *Mont. & Ayr.* 311.

A witness, who refuses to read entries, must not be committed for refusing to answer the said question.

In re STOCKWIN, T. T. 1836. K. B. 6 N. & M. 813; S. C. 5 A. & E. 266.

After commitment a witness cannot call on the commissioners to sit immediately he conforms, without paying the costs of the sitting.

COMMISSIONERS of bankrupt committed a witness to Newgate on the 5th November, until he should submit himself to the examination: in Easter Term he obtained a habeas corpus for his examination, but the commissioners refused to appoint a sitting, unless upon the terms of the costs occasioned thereby being paid. An affidavit declared his inability to pay the costs,—

Per Cur.—*Ex parte Baxter*, Mont. & Mac. 16, is in point; he must either pay the costs or wait until the next sitting.

Ex parte BAGSTER, T. T. 1828. K. B. 2 M. & R. 467; S. C. 8 B. & C. 344.

A witness committed must be brought by habeas corpus, a mandamus will not lie.

A WITNESS had been committed for not answering satisfactorily, and being prepared to make the requisite answers, of which the commissioners had been informed, applied for a mandamus to compel them to examine him.

Sed Per Cur.—The witness must not, in consequence of his default, throw the expense upon the estate, which would be the effect of granting a mandamus. The proper remedy is by habeas corpus.

5. Over the Assignees*.

6. *Proceedings by Party committed, when he wishes to conform*†.

7. *Proceedings after Committal*‡.

Ex parte BAGSTER, T. T. 1828. K. B. 8 B. & C. 344; S. C. 2 M. & R. 467.

THE applicant had been committed by commissioners for not satisfactorily answering. On motion for a mandamus—

Lord Tenterden, C. J., said—Why is the estate to bear the expense of bringing this person up? He was committed in consequence of his own default, and must bear the expense of a habeas corpus when he chooses to be examined again. Rule refused.

Ex parte GARCIA, M. T. 1836. C. P. 3 Bing. N. S. 299; S. C. 3 Scott, 662; S. C. 5 D. P. C. 352.

Where a bankrupt is in cus-

THE bankrupt was in the custody of the warden for debt, the commissioners directed their warrant to the keeper of Newgate, to

* By 6 Geo. 4, c. 16, s. 101, commissioners may summon the assignees, and compel them to produce all books, deeds, &c., belonging to the bankrupt, and in default of appearance, &c., may grant a warrant to compel their attendance, and may commit the assignees.

† A person committed must apprise the commissioners when he is ready to conform. (*Rex v. Jackson*, 1 T. R. 654). And if he does not then appear to answer satisfactorily may apply to the Queen's Bench for a mandamus. (*In re Bromley*, 3 D. & R. 310). *Sed vide Ex parte Bagster*, supra.

‡ By 5 Geo. 2, c. 30, and 6 Geo. 4, c. 16, s. 39, habeas corpus is the proper remedy for obtaining discharge after commitment; but under circumstances a judge may re-commit.

detain the bankrupt in his custody, until he should make satisfactory answers, &c.; upon writ of habeas corpus, directed to the warden, commanding him to bring up the bankrupt, that he might be discharged from such warrant, it appeared, from the return to the writ, that the party was in the warden's custody upon five writs for debt, but that he was not in his custody under the warrant, which was, in fact, not in the warden's possession, but in that of the keeper, to whom it was directed.

tody of the warden for debt, and also committed by the commissioners to Newgate, the Court of Common Pleas,

Per Cur.—The warden, in obedience to the writ, has returned the causes of the party's being in his custody, namely, five writs. He also states that the warrant of the commissioners, directed to the keeper of Newgate, has been shewn to him, but he does not return such warrant as a cause of the party's imprisonment. In fact, the party does not appear to be in custody under the warrant at all. This application, therefore, has been prematurely made. No man is entitled to the writ, except he is imprisoned for the cause for which the writ is obtained. He cannot avail himself of the writ before he is in such custody.

See ante, 1 & 2 Will. 4, c. 56, p. 49.

Ex parte KNIGHT, M. T. 1836. Ex. 2 M. & W. 106.

ON motion for a habeas corpus it appeared that William Knight, a bankrupt, was brought before a subdivision Court of the Commissioners of Bankruptcy, in Basinghall Street, and by that Court committed to Newgate, for not answering questions to their satisfaction. He was at the time in the custody of the warden of the Fleet, in execution for debt, and was brought by the messenger to the fiat before the Court. The warrant of committal was directed to the gaoler of Newgate, who delivered the bankrupt to the messenger, and he delivered him back to the warden of the Fleet. He was then confined within the walls of that prison.

and the Court of Exchequer, have refused to interfere.

The Court refused the writ; first, that on the perusal of the questions and answers, they considered the commissioners were justified in holding the examination not to be satisfactory; and, secondly, that it did not appear, that the bankrupt was detained in custody on this warrant.

(d) OF THE RIGHTS OF*.

* By 6 Geo. 4, c. 16, s. 22, the commissioners were entitled to certain fees; but by 1 & 2 Will. 4, c. 56, they have a fixed annual salary.

By 6 Geo. 4, c. 16, in actions of false imprisonment, the Court may look at the whole of the examination of the party committed. No writ to be sued out, or copy of process served, against or on any commissioner in less than a month after notice given. Notice to set forth cause of action, &c. Plaintiff shall not recover unless notice proved, and no evidence shall be given of any thing not contained in the notice. Tender of amends, within one month after notice, may be pleaded in bar, and any other plea by leave, &c. Verdict for defendant if amends sufficient.

Sect. 44. "That every action, brought against any person for any thing done in pursuance of this act, shall be commenced within three calendar months next after the fact committed, and the defendant or defendants in any such action may plead the general issue, and give this act and the special matter in evidence at the trial, and that the same was done by authority of this act; and if it shall appear so to have been done, or that such action was commenced after the time before limited for bringing the same, the jury shall find for the defendant or defendants, and if there be a verdict for the defendant or defendants, or if the

(e) DUTIES* AND LIABILITIES OF†.

(f) DISABILITIES OF‡,

VIII. OF THE PROVISIONAL ASSIGNMENT §.

MOULT *v.* MASSEY, M. T. 1830. K. B. 1 B. & Ad. 636.

Before 1 & 2 Will. 4, under 6 Geo. 4, c. 14, the provisional assignment must have been direct from the provisional assignees to those chosen by the creditors.

THE commissioners, in the first instance, assigned all the bankrupt's personal estate to four provisional assignees; the latter covenanting, in the usual manner, to join the commissioners in assigning the same over to the assignees who should be afterwards chosen. Three of those four, and three other persons, were afterwards chosen assignees, and the four then re-assigned all the personal estate to the commissioners, to the intent, as appeared by the deed, that they might be enabled to make a good, valid, and effectual assignment of the same to the assignees chosen by the creditors, whereby the same might become vested in the said assignees, as if the provisional assignment had not been made afterwards by indenture between the commissioners and the six assignees chosen as last mentioned. The commissioners assigned to them all the personal estate of the bankrupt, without any reference to the former conveyances, and in the mode commonly used when there has been no provisional assignment. On the part of the defendant it was objected, that the course thus adopted for transferring the property from one set of assignees to the other was not conformable to the statute, and therefore could not be effectual to pass choses in action.

plaintiff or plaintiffs shall be nonsuited, or discontinue his or their action or suit after appearance thereto, or if upon demurrer judgment shall be given against the plaintiff or plaintiffs, the defendant or defendants shall recover double costs."

* It is the duty of a commissioner, acting under a commission (or fiat), to conceive the commission to be valid. (*Ex parte Steele*, 16 Ves. 164.)

† Trespass was formerly holden to lie against commissioners for a commitment in consequence of improper questions, or for not acquiescing in a proper manner, or for committing a party for an improper time. (*Miller v. Seare and Another*, E. T. 1743, C. P., 2 Bl. Rep. 1141—S. P., *Perkin v. Proctor and Another*, T. T. 1768, C. P., 2 Wils. 382; *Dyer v. Missing and Others*, T. T. 1773, C. P., 2 Bl. Rep. 1035). But it seems now to be well settled, that if the commissioners do any act beyond the limit of their authority, they thereby subject themselves to an action of trespass; but if the act done be within the limit of their authority, although it be done through an erroneous or mistaken judgment, they are not thereby liable to such action. (*Doswell v. Impey and Others*, H. T. 1823, K. B., 1 B. & C. 163; S. C. 2 D. & R. 350).

‡ A commissioner cannot purchase an estate sold under the commission, either for his own benefit, or for the benefit of any other person. (*Ex parte Bennett*, 10 Ves. 381); and if he act as banker and commissioner, he may be liable to costs. (15 Ves. 296).

§ In *Drury v. Man*, 1 Atk. 96, it was said, that provisional assignments are seldom requisite, unless the bankrupt is indebted to the Crown, and an extent is apprehended, or it is intended to carry on the trade. (*Ex parte Williams*, 1 Mod. 141).

But it was the constant practice to make them; (1 Mont. B. L. 94); and by 6 Geo. 4, c. 16, s. 45, the commissioners were to appoint provisional assignees, who upon notice were to deliver the effects to the chosen assignees. However, since the 1 & 2 Will. 4, c. 56, provisional assignments are no longer requisite; because, in London fiats, the official assignee acts as provisional assignee till the appointment of the other assignees under the 1 & 2 Will. 4, c. 56, s. 22, which enacts, "that until assignees shall be chosen by the creditors of each bankrupt, such official assignee to be so appointed to act with the assignees to be chosen by the creditors shall be enabled to act, and shall be deemed to be, to all intents and purposes whatsoever, a sole assignee of each bankrupt's estate and effects.

The Court concurred in this argument, and a rule to set aside a nonsuit was discharged.

See 2 Burr. 704; 4 B. & A. 345.

IX. OF PROVING UNDER THE COMMISSION OR FIAT.

(a) OF DEBTS GENERALLY.

1. *Time at which a Debt is said to accrue.*

See post, Bills of Exchange, p. 56—Contingent Demands, p. 57.

2. *The certainty of its Amount*.*

See post, Div. Mode and Form of Proof.

3. *Its Consideration†.*

(b) OF PARTICULAR DEBTS‡.

* The amount must be precisely ascertained. (Cullen, B. L. 87).

† The debt must be contracted bonâ fide, and for a good and valuable consideration. (1 Mont. B. L. 175; Cullen, B. L. 89).

‡ An alphabetical list of the debts or claims, which may, or may not, be proved under a commission or fiat, may be useful. Claims connected with—

Agreements, may be proved. (*See Forster v. Surtees*, 12 East, Rep. 605).

Annuities, may be proved. (6 Geo. 4, c. 16, ss. 54, 55).

Apprenticeship, sums due under, may be proved. (1 Atk. 149; 6 Geo. 4, c. 16, s. 49).

Attachments, a sum of money to be paid under, may be proved. (2 Rose, 196; Cowp. C. C. 199).

Attorney's Bill, may be proved. (1 G. & J. 261).

Awards, for payment of money, may be proved. (Stra. Rep. 1182).

Bail, claims connected with, may be proved. (6 Geo. 4, c. 16, s. 52).

Baron and Feme, debts due from the wife before marriage, may be proved. (10 Mod. 243; 1 P. Wms. 249).

Bastardy Bonds, cannot be proved, except for the arrears at the time of the bankruptcy. (1 B. & Ald. 491; 1 Campb. 428).

Bonds, may be proved. (6 Geo. 4, c. 56, s. 51).

Bottomry Bonds, may be proved. (6 Geo. 4, c. 16, s. 53).

Clerks, may prove for surplus, after receiving six months' salary. (6 Geo. 4, c. 16, s. 48).

Cognovits, may be proved. (1 Chit. Rep. 16).

Compositions of Creditors, may be proved. (Eq. Abr. 28; 1 Vern. 240).

Covenants, to pay money, may be proved; (4 T. R. 156); but not to do an act. (6 T. R. 489; 3 T. R. 435).

Equitable Claims, may be proved. (1 Sch. & Lef. 48).

Executors, may prove: (2 Bro. C. C. 610); but no proof against, unless there be assets. (4 Tyrw. 69).

Friendly Societies. (*See* 33 Geo. 3, c. 54, s. 10).

Guarantees, *semble*, may be proved. (1 Mont. & Ayr. 541).

Guardian and Ward. Guardian may prove upon petition. (1 Atk. 251).

Insurance. (*See* 6 Geo. 4, c. 16, s. 53). Premiums on a life policy, paid before, and forfeited after, bankruptcy, may be proved. (1 Doug. 166).

Interest, if payable, may be proved. (1 Atk. 79; 14 Ves. 537; 1 Atk. 151).

Legacy, may be proved. (2 Bro. C. C. 305).

Mortgages, may be proved. (*See* 1 Mont. & Ayr. B. L. 174).

Overseers, money received by, cannot be proved. (1 T. R. 369).

Rent, may be proved for. (6 Geo. 4, c. 16, s. 74).

School Money, cannot be proved debitum in præsentî. (4 East, Rep. 437; 1 Smith, 281).

Stock Debts, may be proved. (7 Ves. 302; 3 T. R. 539; 2 B. & P. 1; 3 B. & C. 269).

Sureties. A surety may prove against his principal. (6 Geo. 4, c. 16, s. 52). So, a creditor may prove on behalf of the surety. (49 Geo. 3, c. 121). And the creditor may prove against the surety, though the engagement be conditional. (6 Geo. 4, c. 16, s. 52).

Taxes, collector of, may prove for. (Green, 116, 117).

1. *Connected with Aliens.*OGDEN *v.* PEELE, E. T. 1826. K. B. 8 D. & R. 1.

In June, 1812, war was declared between America and England, during which time A., a native of America, and B., a native of England, had dealings; in 1814, A. consigned goods to B.; in 1815, B. became bankrupt; in 1814, peace was in negotiation; in 1815, after B.'s bankruptcy, the goods arrived:—Held, that A. was entitled to prove for the value.

A., an American, and B., an English subject, were mutually trading before the year 1812, in which year war was declared, and continued until March, 1814, prior to which latter period A. consigned goods to B. in England, who, on arrival, shipped them to France and sold them, and received bills on account of the proceeds, which he procured to be discounted. A second cargo arrived after that date, and was sold by B., prior to the 15th February, 1815; shortly after which he became bankrupt, and was appointed by his assignees their agent, to wind up their affairs, in the course of which he received the proceeds of the second cargo, and transmitted accounts to A., in which he admitted A. to be his creditor for a balance in respect of the proceeds of the two cargoes.

The Court held, that A., being an alien enemy at the time of the first consignment, was only entitled to prove under B.'s commission in respect of the second consignment, as he could have maintained no action.

2. *Connected with Awards.*HASWELL *v.* THOROGOOD, H. T. 1828. K. B. 7 B. & C. 705.

A cause was referred, by an order of Nisi Prius. After award made, before costs taxed and judgment signed, the plaintiff became bankrupt:—Held, not a debt proveable.

By an order of Nisi Prius, a cause and all matters in dispute, after verdict, were submitted to arbitration. The arbitrator, by his award, directed a sum of money to be paid by the plaintiff to the defendant; and he further awarded the costs to be paid by the plaintiff of the reference. By the order of Nisi Prius, the costs of the cause were to abide the event; but the costs of the reference were to be in the discretion of the arbitrator. Between the time of the making of the order of reference, and after award made, but before the taxing costs and signing judgment, the plaintiff became bankrupt. On motion for an attachment for non-payment of the costs—

Per Cur.—It has been decided, that where a defendant obtains a verdict, and the plaintiff becomes bankrupt before judgment is signed, the costs cannot be proved under the commission, on the principle that no debt arises in such case until judgment is signed. (*Walker v. Barnes*, 5 Taunt. 778). Now, here the plaintiff became bankrupt after the nonsuit, but before judgment was signed. As to the costs of the reference, there can be no question. They clearly did not constitute a debt proveable under the commission. Rule absolute.

3. *Connected with Bills of Exchange and Promissory Notes.*RHODE *v.* PROCTOR, T. T. 1825. K. B. 4 B. & C. 517; S. C. 6 D. & R. 610.

Notice of dishonour by the

THIS was an issue from the Court of Chancery on the question, whether the plaintiffs, as assignees of Sawyer, had any debt prove-

Trustees, who have misapplied the trust-fund, cannot prove against their own estate. (2 Rose, 413).

Usury, a debt void by reason of, cannot be proved. (3 Ves. 372; 2 Taunt. 184).

able upon the estate of Rains, a bankrupt. The bills in question were drawn by Rains on Lacklan, were indorsed to Sawyer, and became due in June, 1818. Before that time the drawer and acceptor were both bankrupts; but Rains, the drawer, had not surrendered to his commission. His act of bankruptcy was by leaving the kingdom about the 3rd April, 1818. A commission issued on the 17th, and he had never returned since. Lacklan, the acceptor, became bankrupt on the 23rd April, 1818. The bills were dishonoured, but no notice was left at Rains's house or sent to his assignees. The house was open at the time, in the possession of the messenger, and the holder (Sawyer) knew the defendants to be Rains's assignees. The question on these facts was, whether the want of notice to the drawer or his assignees barred the plaintiff's claim.

acceptor should be given to the assignees of drawer, when the holder knows the former: otherwise, the bill is not proveable*.

Per Cur.—We think it did. On the dishonour of a bill, the holder must use due diligence to give notice to such of the parties as would have a remedy over upon it, in case they took it up, or he will make it his own as against them, and loses his remedy on the bill against them by neglecting to use such diligence, and therefore could not prove.

4. Connected with Bonds.

SKINNERS' COMPANY v. JONES, H. T. 1837. C. P. 3 Bing. N. S. 481; S. C. 4 Scott, 271.

THE defendant, with one H., entered into a joint and several bond, with a penalty conditioned for the repayment by H. of a sum of money lent, at the end of three years, and for payment of interest on the 1st March in each year. In 1833, the interest was not paid until the 30th March, after which the defendant became a bankrupt and obtained his certificate:—

A bond, which is forfeited by non-payment of interest before the bankruptcy, is proveable.

The Court held, that the certificate was a bar to an action against the defendant for a subsequent default by H. in not paying the principal, as the bond was forfeited by the non-payment of interest on the appointed day, before the bankruptcy, and the forfeiture could not be purged by the subsequent payment; consequently, the penalty became the debt in law, and was proveable under the commission.

5. Connected with Contingent Demands†.

BOORMAN v. NASH, H. T. 1829. K. B. 9 B. & C. 145.

THE defendant contracted for the purchase of goods to be delivered at stated times, and at the prices of the then market-day, and be-

Where a trader contracts for a

* Formerly, a bill or note, not due at the time of the bankruptcy, could not be proved; (Bunb. 120); but now, by the 7 Geo. 1, 5 Geo. 2, 49 Geo. 3, and 6 Geo. 4, c. 16, s. 61, it may be proved, after deducting the whole of interest for the time the bill or note had to run.

† May be proved. (6 Geo. 4, c. 16, s. 56). Before the passing of this act, debts depending upon a contingency, which had not taken place at the time of the bankruptcy, could not be proved; (2 P. Wms. 395; 2 Stra. 867; 1 Atk. 114; 3 Wils. 270; 3 T. R. 435; Doug. 165; 2 P. Wms. 497); consequently, a debt payable at a future uncertain period was not proveable. (*Ex parte Barker*, 9 Ves. 110; *Ex parte East India Company*, 2 P. Wms. 396). So, a covenant in a marriage settle-

certain quantity of goods to be delivered at a future day, but, before the day of delivery, the trader becomes bankrupt, and the goods fall in value, the loss sustained by the vendor is not a debt proveable under the commission.

came bankrupt, and obtained his certificate before the first delivery was to be made. The goods were afterwards tendered and refused:—

Held, that the action was maintainable, notwithstanding the bankruptcy, the contract not being rescinded, as the assignees might have affirmed it, if they thought fit; nor the amount of damage, being capable of being ascertained until the market price known; and it was not, therefore, proveable;—held, also, that the amount of damage was to be ascertained by the difference between the price contracted to be paid, and that which might have been obtained for the goods on the day when the contract ought to have been completed.

CLAYTON *v.* GOSLING, E. T. 1826. K. B. 5 B. & C. 360; S. C. 8 D. & R. 110.

A debt proveable, after notice, may be proved, although notice may not have been given before the bankruptcy.

At the trial, the following note was produced:—
“£200.

“On having twelve months’ notice, we jointly and separately promise to pay Mr. John Clayton, or order, two hundred pounds for value received, with lawful interest. Witness our hands the 30th day of December, 1820.

“GEO. GOSLING,
“J. D. BOWER.”

It was contended, for the plaintiff, that it was not proveable under the defendant’s commission, the notice required by the note not being given; therefore, it was not either “due” or “payable” within the words of the 7 Geo. 1, c. 31. The note might, in fact, never become payable, because the notice might never be given. The defendant’s plea is, that the cause of action accrued before the bankruptcy; but how can this be the fact, seeing that there is no cause of action until notice has been given, and that there was no notice until after the bankruptcy? The cause of action is in default of payment after notice. In *Winter v. Mauseley*, (2 B. & Al. 802), it was held, that a bond payable twenty days after demand was not proveable, there being no demand before the bankruptcy.

The Court were of opinion, that the debt was proveable under the commission. The note admitted a debt to be due, though it limited the time for payment.

6. *Connected with Costs.*

BROUGH *v.* ADCOCK, T. T. 1831. C. P. 7 Bing. 650; S. C. 5 M. & P. 678.

Where a defendant obtains a verdict, and the plaintiff becomes bankrupt before judgment

On the 25th January, 1831, the defendant gave notice of motion, and, on the 31st, obtained a rule absolute for judgment as in case of a nonsuit; and, on the 9th February, judgment was signed as of last Hilary term generally; and plaintiff was afterwards taken in execution. The plaintiff committed an act of bankruptcy on the 10th

ment to transfer stock, upon one month’s notice, into trustees’ names, with leave to trustees to forbear notice during covenantor’s life, could not be proved; (*Ex parte Alcock*, 1 V. & B. 176; 1 Rose, 326); nor a covenant within seven years, upon request, to convey lands of a certain value, was not proveable, though the covenantor became bankrupt after the seven years, if no request was made, unless the covenant was secured by a penalty; (*Ex parte Mare*, 8 Ves. 635); nor a contract to pay another’s debt, upon notice, if no notice had been given. (*Ex parte Minet*, 14 Ves. 189).

January, and the commission issued on the 25th. On the 28th April, plaintiff obtained his certificate. The 47th section of 6 Geo. 4, c. 16, provides, "That every person with whom any bankrupt shall have bona fide contracted any debt, before the issuing of the commission, shall, notwithstanding any prior act of bankruptcy, be admitted to prove, provided he had not, at the time of the debt, notice of any act:—

Held, that he is not entitled to his discharge, upon his obtaining his certificate, from a ca. sa. issued by defendant, the debt not being proveable under the commission.

signed, the costs cannot be proved.

BIRE v. MOREAU, H. T. 1827. C. P. 4 Bing. 57; S. C. 12 Moore, 226.

At the sittings after Trinity term, a verdict was found for the plaintiff in an action on bills of exchange accepted by the defendant. A commission of bankruptcy, dated the 22nd August, 1826, was issued and awarded against the plaintiff, under which he was declared a bankrupt and passed his final examination. On the 6th October, 1826, he obtained his certificate under the commission, which was allowed on the 9th November following; final judgment upon the verdict was signed on the 14th December last, and a writ of fieri facias issued thereupon, returnable in eight days of St. Hilary in this term; and that, by virtue of that writ, the sheriff of Middlesex levied, on the 19th of this present month, for 56*l.* 15*s.* on goods acquired by the plaintiff subsequently to the allowance of his certificate, and which sum still remains in the hands of the sheriff.

The 58th sect. 6 Geo. 4, c. 16, only gives a plaintiff a right to prove the costs of an action under the commission, where he has obtained judgment against a party who afterwards becomes bankrupt*.

Sed per Cur.—There was no debt proveable under the commission until it was matured by the judgment. The 56th section of the statute does not apply to this case, as the debt was not contracted before the issuing of the commission, or even ascertained; but the plaintiff was made debtor by a proceeding in invitum; and if the 56th section could be applicable, there would be no reason for the introduction of the 58th, which provides, that if a *plaintiff* shall have obtained judgment against any person, who shall thereafter become bankrupt, such *plaintiff* shall be entitled to prove for the costs, although they shall not have been taxed.

7. Connected with Damages.

GREEN v. BICKNELL, T. T. 1838. Q. B. 3 N. & P. 634; S. C. 8 Ad. & E. 701.

THE question in this case was, whether the difference between the contract price of a cargo of whale oil of merchantable quality, which certain persons had agreed to purchase of the plaintiff, but had refused to accept, and the market price of the oil at the time of

A claim to recover the difference between the contract price and the

* In general, costs at law, after judgment, bear relation to the debt; therefore, if the debt may be proved so may the costs, (3 M. & S. 326), whether actions of *tort* or contract. (1 H. Bl. 29, n.; 14 East, 202, n.). And the 6 Geo. 4, c. 16, s. 58, enacts, "that if the plaintiff in an action at law, or suit in equity, or petitioner in bankruptcy or lunacy, shall have obtained any judgment, decree, or order, for any demand, proveable under the commission, he shall be entitled to prove for costs."

market price—
a voyage inter-
vening before a
refusal to ac-
cept—is not
damages prove-
able;

refusal, could be proved under a fiat of bankruptcy issued against those persons, upon an act of bankruptcy committed subsequent to the refusal.

Per Cur.—In many cases in Chancery, proof has been admitted of the value of stock agreed to be transferred at a given day: most of them are cases of loans of stock, but there is an instance of allowing the value of a sum of stock to be proved which was covenanted to be transferred by marriage settlement. We were strongly pressed with the authorities, as establishing the principle, that any right to recover money or money's worth may be treated as a debt when its amount can be fixed by calculations; but we think those cases must be regarded as exceptions to the rule, which is, generally speaking, that no claim of this nature shall be proveable as a debt for which the intervention of a jury is necessary. We are of opinion, that the sum claimed is not a debt, but damages, and cannot be proved.

THOMPSON *v.* THOMPSON, T. T. 1835. C. P. 2 *Bing. N. S.* 168; 2 *Scott*, 266.

because the da-
mages can only
be estimated by
a jury.

ONE question in this case was, whether damages occasioned by non-performance of covenants for payment of an annuity, and for completing buildings within a specified time, were debts or demands proveable under a commission of bankruptcy.

Per Cur.—That is a demand for general and unliquidated damages, such as cannot be ascertained without the intervention of a jury, and is altogether incapable of forming the subject of a proof, by the affidavit or deposition of the party himself. Such damages can never, therefore, be considered as a debt or demand payable under a commission.

8. *Connected with Husband and Wife.*

TINDAL, *Ex parte*, E. T. 1832. C. P. 8 *Bing.* 402; S. C. 1 *M. & Scott*, 607.

A covenant by
a husband to
pay to his wife's
trustees £——
within twelve
months after his
death, and dur-
ing his life the
interest, is a
debt proveable
under the hus-
band's commis-
sion.

A COVENANT contained in a marriage settlement, that, twelve months after the husband's decease, his executors should pay trustees a certain sum for the benefit of his intended wife and children, and during his life the interest, held to be a debt payable on a contingency within the 6 Geo. 4, c. 16, s. 56, and proveable under the husband's commission, and the valuation to be the present worth of such a sum payable twelve months after his death, without reference to there being children.

9. *Connected with Judgments.*

Ex parte BIRCH, E. T. 1825. K. B. 4 *B. & C.* 880; S. C. 7 *D. & R.* 436.

As a judgment
of the term re-
lates to the first
day of the
term*, though
signed after, it

THE plaintiff had been employed by the bankrupt in making a distress under an improper authority, and compelled to pay damages, whereupon he brought assumpsit, on the undertaking that the bankrupt had a sufficient authority to employ him; and, on the 4th June, obtained a verdict and damages, and final judgment

* But, by Rule H. T. 4 Will. 4, the judgment must now bear date the day it is signed.

signed thereon, on the 16th June, as of Trinity Term, which commenced on the 7th: on the 15th, a commission of bankruptcy issued, founded on an act of bankruptcy committed on the 17th May preceding:—Held, that the party had at the date of the commission a debt proveable under it, the judgment relating to the first day of the term.

is proveable where the commission issues after the first day of the term;

GREENWAY v. FISHER, M. T. 1827. K. B. 7 B. & C. 436; S. C. 1 M. & R. 330.

THE plaintiff had sued the defendant in an action of trover. Easter term, 1824, began on the 5th May. On the 13th a commission of bankrupt issued against the defendant, (under which he afterwards obtained his certificate), and on the 19th, judgment was signed in the action. The plaintiff then proceeded by scire facias on the judgment. The defendant appeared, and pleaded his bankruptcy in bar. The plaintiff joined issue, and on the trial of the cause a verdict was found for the plaintiff, with liberty for the defendant to move for leave to enter a nonsuit. A rule to show cause having been obtained accordingly, the Court held, there could be proof in such a case, the action being *tort* made no difference.

even in actions of *tort*.

10. *Connected with Joint Debts.*

CHUCK, *Ex parte*, E. T. 1832. C. P. 1 M. & Sc. 615; S. C. 8 Bing. 469.

A PARTY, upon an advance to two others in partnership, by deed was entitled to have an account of the profits, so as to get certain sums out of the clear profits, as the case might be, and although executed by the former when under age, was afterwards confirmed by him when of full age, but his name never appeared as a partner:—Held, that he was a partner; and the new firm having become bankrupt, the creditors of the old as well as of the new firm were entitled to prove against the estate of the new firm, the knowing or not knowing of the change making no difference.

A joint commission may issue against A., B., and C., though A.'s name did not appear, if he were to receive according to the profits; and all the joint creditors may prove.

11. *Connected with Principal and Surety.*

BROWNE v. LEE, E. T. 1827. K. B. 6 B. & C. 689. See also, ante, tit. *Annuity*.

A., B., and C., were co-sureties for the payment of an annuity for D., their principal. A. became bankrupt: B. paid money on account of A. for arrears of the annuity, D. having made default. It also appeared, that C. had become insolvent at the time of such payment.

The Court held, that A. was liable to an action for contribution, although C. had obtained his certificate; inasmuch, as one surety could not prove the value of the annuity under the commission against his co-surety; but that he could not, at law, be compelled to repay more than one-third of the sum paid on account of the annuity, although the third surety had become insolvent at the time of such payment.

A., B., and C., were sureties for an annuity; A. became bankrupt; B., after the bankruptcy, paid arrears:—Held, not a debt proveable*.

* Where a debt is guaranteed, and the debtor becomes bankrupt, and the creditor proves, the proof must go in reduction of the guarantor's liability. (*Raikes v. Todd*, M. T. 1838, Q. B., 1 P. & D. 138. Abridged, post, tit. *Guarantee*).

DUNCAN v. SUTTON, H. T. 1835. C. P. 1 *Bing. N. S.* 431; S. C. 1 *Scott*, 338.

A bankrupt, after his bankruptcy, gave a warrant of attorney, with two sureties. The bankrupt did not pay. The sureties allowed the creditor to prove: held, that the sureties were not entitled to relief in a summary way.

THE defendant, after his bankruptcy, gave the plaintiff a warrant of attorney, with two sureties, for the payment of his debt upon a certain day. The plaintiff, by the desire of the sureties, proved under the commission, but no dividend was made. The debt not being paid upon the appointed day, the plaintiff entered up judgment on the warrant of attorney. Upon motion to set aside the judgment, on the ground that the plaintiff had elected to prove under the commission—

Per Cur.—We have great doubts, whether this case is within the 59th clause of the 6 Geo. 4, at all. That clause refers to demands before the bankruptcy; whereas this is a warrant of attorney given by these parties after the bankruptcy, and though the security was given for a debt virtually due before the bankruptcy, it seems to us too much to say, that it is a demand prior to the bankruptcy. In addition to this, we doubt much the propriety of granting the application to these sureties, who requested the plaintiff to prove under the commission. They have, in our opinion, no right to apply to the Court to be relieved in this summary manner.

TUCK v. FYSON, M. T. 1829. C. P. 6 *Bing.* 321; S. C. 3 *M. & P.* 715.

A surety in a lease is liable on the bankruptcy of his principal for breaches of covenant between the date of the commission and delivery up of the lease, under 6 Geo. 4, c. 16.

THE defendant joined in a lease as surety for the performance of the covenants by the lessee. The lessee became bankrupt, and delivered up the lease to the lessor, under the 75th section of the 6 Geo. 4, c. 16:—Held, that, although the lessee was thereby personally discharged of his liability to the performance of the covenant from the date of the commission, the term was not absolutely extinguished from that period, but that the surety remained liable for breaches occurring prior to the actual delivery up of the lease by the bankrupt to the lessor.

12. *Connected with Servants*.*

THOMAS v. WILLIAMS, T. T. 1834. K. B. 3 *N. & M.* 545; S. C. 1 *A. & E.* 685.

A servant, under the 6 Geo. 4, is entitled to be paid pro ratâ, though a yearly hiring, as the statute does not alter the legal effect of the contract.

IN debt for wages, it appeared that the defendant, the bankrupt, employed the plaintiff as his clerk at a yearly salary. There were no specified times appointed for payment, but the jury found a dissolution of the contract by mutual consent at a time subsequent to the commission, and in the course of the current year.

The Court held, that, as the 6 Geo. 4, made no alteration in the legal effect of the contract of hiring, that the servant was entitled to recover, pro ratâ, for the time he so served after the bankruptcy, and that the bankrupt's certificate was no bar.

13. *Connected with Usurious Contracts†.*

* Are entitled to six months' wages in full, and to prove for the residue. (6 Geo. 4, c. 16, s. 48).

† A bond under seal, which is legal, cannot be rendered void by a subsequent written agreement not under seal, though usurious, so as to prevent proof of the debt. (*Parker v. Ramsbottom*, M. T. 1824, K. B., 5 *D. & R.* 138; S. C. 3 *B. & C.* 257).

(c) MANNER AND CONDITION OF PROOF.

1. *Time and Place of proving**.
2. *Form and Mode of*†.

AUGARD *v.* THOMPSON, T. T. 1837. Ex. 2 M. & W. 617; S. C. 5 D. P. C. 762.

THE defendant in this action, on the 4th November, (which was after plea pleaded), became a bankrupt. On the following day, a notice was given by the plaintiff's attorney, that the plaintiff had elected to prove, under 6 Geo. 4, c. 16, s. 59, and that no further proceedings would be taken in the action. On the 9th November, the defendant served the plaintiff with a rule to reply, upon which the plaintiff applied for, and on the 14th November obtained, a rule for a stay of proceedings, under the 59th section of the bankrupt act. On the 16th November, the plaintiff's attorney, with the assignees, went before the commissioners for the purpose of proving the debt, and evidence was gone into; but the bankrupt being absent, the *further* consideration of the proof was adjourned, and the debt was not proved. On an application, that the plaintiff might continue his action—

Per Cur.—In this case a doubt arose, whether the plaintiff had made an election to prove within the meaning of 6 Geo. 4, c. 16, s. 59. We think that a party cannot be said to have made this election, unless he has proved, or entered a claim, upon the proceedings under the commission.

To constitute the proof of a debt within 6 Geo. 4, the creditor must actually prove, or have his claim entered on the proceedings.

3. *Who to prove*‡.

* Creditors should prove at a public meeting before the commissioners. (1 Mont. B. L. 142). But they may be allowed to prove at any time while any funds remain to be divided. (1 Atk. 79). The debt must be proved at the place appointed for the meeting. (6 Geo. 4, c. 16, s. 46).

† Creditors may be examined as to the truth and certainty of their claims. (6 Geo. 4, c. 16, s. 46). The usual proof is the oath of the creditor; (1 T. R. 369); which is binding, unless the bankrupt or other creditors object to it. But if no opposition be made in a reasonable time, such proof by oath is conclusive. (1 Atk. 77). The form of a creditor's deposition is, that the debt was due and owing before the date of the commission. (2 B. & P. 1).

And by 1 & 2 Will. 4, c. 56, s. 34, it is enacted, "That it shall be lawful for any creditor to make proof of his debt, by affidavit sworn before one of the said Judges or Commissioners, or before a Master in Chancery, ordinary or extraordinary, or, if such creditor shall live out of England, by affidavit sworn before a magistrate where such creditor shall be residing, and attested by a notary public, British minister, or consul, subject nevertheless to such rules and orders, touching the personal attendance of any creditor to make such proof according to the existing laws and practice in bankruptcy, as the Court of Review, with the consent of the Lord Chancellor, shall from time to time make and direct."

‡ By 6 Geo. 4, c. 16, s. 46, the creditor may prove his own debts, or the agent to a corporation may prove, or, if the creditor reside in a remote place from the meeting, or abroad, he may prove by affidavit, subject to the examination of the commissioners.

A receiver of a company is the proper person to prove a debt due from a bankrupt to the company, and his appointment under the common seal of the company must be exhibited to the commissioners. (Green, 117). So, a corporation might prove, before the 6 Geo. 4, c. 16, s. 46, by the affidavit of a person authorized by a general power of attorney, under their common seal. (*Ex parte Bank of England*, 1 Swanst. 10). But they could not prove by their clerk without warrant. (*Ex parte Bank of England*, 18 Ves. 228; *contra*, 1 Rose, 142).

4. *When disputed**.
5. *Creditor having a Security†*.
6. *Creditor proving Debts contracted after Act of Bankruptcy‡*.
7. *Election to proceed at Law§*.

ADAMS v. BRIDGER, E. T. 1832. C. P. 8 Bing. 314; S. C. 1 M. & Scott, 438.

Under 49 Geo. 3, c. 121, s. 14, proof under the commission is an election, and, in substance, though not in form, a discontinuance of any suit commenced at the time of 6 Geo. 4, c. 16.

THE defendant became bankrupt in 1816; and the plaintiff proved under his commission, and, receiving no dividend, in 1831 commenced an action for the same debt. On motion to stay proceedings—

The Court said, the 49 Geo. 3, c. 121, made proof of a debt an election not to sue; therefore, although not in form, it was in substance, a discontinuance of any suit commenced at the time. And notwithstanding that statute was repealed by the 6 Geo. 4, c. 16, for matters passed and completed, the law then in force must prevail.

So, where a bankrupt is in arrear for taxes, the collector is the proper person to prove for the parish, but he must produce his appointment. (Green, 116). And if the collector himself, being indebted for money had and received by him in that capacity, become bankrupt, one parishioner will be allowed to prove for himself and the rest of the parishioners; (*Ex parte Child*, 1 Atk. 111); for though he cannot directly swear that no other inhabitant of the parish has received any security or satisfaction, it is enough that he can swear that neither he nor any other has to his knowledge or belief. (*Ibid.*) A cestui que trust must join in the proof of debts, and the trust-deed should be exhibited to the commissioners. (Green, 149; Cox, 310). So, in the case of assignees of a bankrupt, or the assignee of a bond or debt, the bankrupt and the assignee respectively are required to join in the deposition. (Green, 147). A guardian may, on petition, be admitted to prove on behalf of an infant. (1 Atk. 251; 2 Bro. 305). So, if a navy agent become bankrupt, one of the admirals may prove on behalf of himself and the crew. (1 Mont. B. L. 78). And in case of lunacy, the proof may be by a friend. (1 Rose, 387). An executor must prove for his testator; (2 Bro. 609); and if a creditor sell his debts, the purchaser is entitled to prove in the name of the creditor. (1 Rose, 4; 17 Ves. 246).

* By 1 & 2 Will. 4, c. 56, s. 30, any one of the six (London) commissioners, if he think fit, may adjourn the examination of a proof of debt to be heard before a subdivision Court, which said Court shall proceed with such last-mentioned examination, and finally, and without any appeal, except upon matter of law or equity, or of the refusal or the admission of evidence, shall determine upon such proof of debts: Provided always, that, in case, before the said commission or subdivision Court, both parties, the assignees, or the major part of them, and the creditor, consent to have the validity of any debt in dispute tried by a jury, an issue shall be prepared under the direction of the said commissioners or subdivision Court, and sent for trial before the Chief Judge, or one or more of the other Judges (of the Court of Review); and if one party only applies for such issue, the said commissioner or subdivision Court shall decide whether or not such trial shall be had, subject to an appeal as to such decision to the Court of Review.

† A creditor, at the time of proving his debt, must say whether he has a security or not; (1 Atk. 104; 1 Buck, 398); and all securities must be produced. (6 Ves. 812). If he has several securities, and insists upon proving, he must deliver up the securities for the benefit of the creditors at large. (1 Atk. 104; 2 Atk. 528). A creditor who has given up his security, and proved, cannot, upon discovering its value, retract. (18 Ves. 290; 1 Rose, 96).

‡ Cannot be proved, as a warrant of attorney. (1 T. R. 715).

§ By 49 Geo. 3, c. 121, s. 14, and 6 Geo. 4, c. 16, s. 59, proving a debt is an election and precludes the creditor from proceeding at law.

8. *Effect of Proving.*

BRIDGET *v.* MILLS, M. T. 1826. C. P. 4 *Bing.* 18; S. C. 12 *Moore*, 92.

A COMMISSION of bankrupt issued against the defendant. The plaintiff had two claims—one for goods sold, and another on a bill of exchange. The plaintiff proved for the former debt, and afterwards brought an action on the bill of exchange.

The Court said, it was clear that the creditor had a right to sue for or to prove each individual debt, provided one debt was unconnected with the other.

Proving one debt under a commission does not preclude the creditor from electing to sue for another.

9. *Creditor having Benefit of another's Proof.* See 49 *Geo.* 3, c. 121; and 3 *Peters. Abr.* 669, 670; and ante, p. 61.

10. *Reduction of Proof**.

11. *Under Commission or Fiat against Partners.* See tit. *Partners.*

(d) OF SECURITIES GIVEN IN CONSIDERATION OF PROOF.

BREALEY *v.* ANDREW, T. T. 1837. K. B. 2 *N. & P.* 114; S. C. 7 *A. & E.* 108.

THIS was a motion in arrest of judgment. The declaration stated, that before W. Joy became a bankrupt, to wit, on &c., the defendant was indebted to the said W. Joy in the sum of £200, for money before that time received by the defendant for the use of the said W. Joy; and that, on &c., a certain commission of bankruptcy had been and was issued against the said defendant; and thereupon, on the 5th December, 1829, in consideration of the premises, and that the said W. J. would prove the sum of £200 against the estate of the said defendant, under the said commission of bankruptcy, defendant promised the said W. J. to pay him the said sum of £200, after the delay of a few months; yet the said plaintiff saith, although a long time, to wit, five years, had elapsed since the making of the promise, and although the said W. J. did afterwards prove the said sum of £200 against the estate of the said defendant, yet that the defendant had not paid the said sum of £200.

A declaration stated, that, in consideration that the plaintiff would prove 200*l.* against the estate of the defendant, he would pay him the 200*l.*, is bad in arrest of judgment, the consideration being bad.

Per Cur.—It appears to us, that the count is bad, and could only be made good by supposing facts not stated in it. The declaration states a promise by the bankrupt to bind his property in a manner which he could not do.

X. OF THE ASSIGNMENT.

By 1 & 2 *Will.* 4, c. 56, s. 25, it is enacted, "That where any person hath been adjudged bankrupt, all his personal estate and effects, present and future, which, by the laws now in force, may be assigned

Since 1 & 2 *Will.* 4, c. 56†, the personal estate,

* If proof be for a larger sum than is actually due, the excess must be expunged, and the dividend paid only upon the residue. (1 *Mont. B. L.* 145).

† Before the 1 & 2 *Will.* 4, c. 56, under 5 *Geo.* 2, c. 30, the commissioners assigned the bankrupt's effects to the persons chosen assignees; and under the

by commissioners acting in the execution of a commission against such bankrupt, shall become absolutely vested in, and transferred to, the assignees or assignee for the time being, by virtue of their appointment, without any deed or assignment for that purpose, as fully, to all intents, as if such estate and effects were assigned by deed to such assignees and the survivor of them; and as often as any such assignee shall die or be lawfully removed, and a new assignee duly appointed, all such personal estate as was then vested in such deceased or removed assignee shall, by virtue of such appointment, vest in the new assignee, either alone or jointly with the existing assignees, as the case may require, without any deed or assignment for that purpose."

and real estate*, vest in the assignees by virtue of their appointment, without deed or assignment.

By s. 26, it is enacted, "That where any person shall have been adjudged a bankrupt, all such present and future real estate of such bankrupt, whether in the United Kingdom of Great Britain and Ireland, or in any of the dominions, plantations, or colonies belonging to his Majesty, as by the said recited act is directed to be conveyed by the commissioners to the assignees, shall vest in such bankrupt's assignee or assignees for the time being, by virtue of his or their appointment, without any deed of conveyance for that purpose; and as often as any such assignee or assignees shall die, or be lawfully removed or displaced, and a new assignee or assignees shall be duly appointed, such of the aforesaid real estate as shall remain unsold or unconveyed, shall, by virtue of such appointment, vest in the new assignee or assignees, either alone or jointly with the existing assignees, as the case may require, without any conveyance for that purpose.

XI. WHAT PROPERTY DOES OR DOES NOT PASS UNDER A COMMISSION OR FIAT.

(a) IN GENERAL †.

MOGG v. BAKER, H. T. 1838. Ex. 3 M. & W. 195.

The right of the assignees is limited to such things as the

IN 1835, A. became tenant of a house to B., who put furniture in and paid for it, upon an arrangement then made, that A. should execute to B. a bill of sale of the furniture as a security for its

6 Geo. 4, c. 16, (except copyholds), lands, tenements, and hereditaments in England, Scotland, Ireland, and the colonies.

The commissioners have only a limited power, which must be exercised as directed by the statutes; (T. Jones, 196; S. C. 1 Vent. 360; S. C. Skin. 30; S. C. 1 Shaw, 200); therefore, if the assignment were not duly enrolled, it was unavailing. (12 Mod. 3; T. Jones, 196; Vent. 360).

By 5 Geo. 2, c. 30, and 6 Geo. 4, c. 16, the Chancellor might vacate the assignment, and make a new assignment, which vested the personal estate in the new assignees. And the real estate was also vested in the new assignees, without a conveyance from the former assignees.

* Except copyhold. (See 6 Geo. 4, c. 16, s. 64).

† Every description of personal property, to which a bankrupt is either legally or equitably entitled at the time of the bankruptcy, or to which he may be entitled previously to obtaining his certificate, passes to the assignees. (6 Geo. 4, c. 16, s. 66; 5 Geo. 2, c. 30; 21 Jac. 1, c. 19; 1 Jac. 1, c. 15; 13 Eliz. c. 7; 1 V. & B. 547). And every species of property, whereof, by possibility, a profit may be made or acquired by a bankrupt before his certificate, passes to his assignees; (7 East, 53; 3 Smith, 58; 3 B. & P. 565; 3 P. Wms. 132); and by 2 & 3 Vict. c. 29, all contracts, &c., *bonâ fide* made by and with any bankrupt previous to the date and issuing of any fiat, are valid.

price. A. offered, from time to time, to execute this security, but it was not done till the 12th of July, 1836. The bill of sale included the furniture, and some other goods brought upon the premises after the first arrangement. Upon the 24th of September, 1836, the furniture and goods upon the premises were sold by B. under the bill of sale. On the 30th of September, 1836, A. was arrested by his creditors, went to prison, and afterwards became bankrupt.

In an action by his assignees against B., for the proceeds of the sale, under 7 Geo. 4, c. 57, s. 33, the Court held that even although the execution of the bill of sale were voluntary on the part of A., and made within three months of his imprisonment, yet the assignees could not recover the value of the furniture, which had been specifically appropriated as a security in equity to B., at the time it was paid for by him. The assignees, either of a bankrupt or insolvent, can recover only such things as he has a right to, both legal and equitable; and where that equitable interest exists, the effect of an assignment would not be to convert it into a legal one.

bankrupt had both a legal and equitable right in. The bankruptcy does not convert the latter into the former.

LAWRENCE v. KNOWLES, E. T. 1839. C. P. 5 Bing. N. S. 399; S. C. 7 Scott, 381.

IN an action against the defendant by the assignees of a bankrupt, for the non-fulfilment of a contract entered into with the bankrupt in respect of railway shares, the plaintiffs alleged that the bankrupt before, and they after, the bankruptcy were ready and willing to pay for the shares according to the agreement. It was proved at the trial that the bankrupt before his bankruptcy was insolvent, and borrowed money from the defendant on his acceptance, which was dishonoured, and that after the bankruptcy there were no assets, and he could not complete the contract.

An agreement by a bankrupt cannot be enforced by the assignees, if the bankrupt could not have performed it for want of assets.

Held, that this evidence was sufficient to support a traverse of the allegations of readiness and willingness to pay, and entitled the defendant to a verdict on such issue.

(b) IN PARTICULAR.

1. *With respect to Appropriated Property* *.

BAILEY v. CULVERWELL, T. T. 1828. K. B. 8 B. & C. 448.

AN agent sold goods to be paid for by bills—The purchaser gave the bills, and directed the agent to hold the goods for him, unless he could sell them at a certain profit. While the goods thus remained, the acceptor of the bills stopped payment. The agent thereupon applied to the purchaser for further security. The purchaser then gave the agent an order to sell the goods. Subsequently, and before any sale, the purchaser became bankrupt: his assignees claimed and brought trover for the goods.

Property of the bankrupt in the hands of others, which he has specifically appropriated before his bankruptcy, will not pass to his assignees.

Held, that they were not entitled; that the application by the agent for security must be considered as an application on behalf of the vendor, whose assent to the arrangement might be presumed,

* *Hutchinson v. Heyworth*, M. T. 1838, K. B., 8 A. & E. 375; S. C. 1 P. & D. 266; Abr. ante, tit. "Appropriation," p. 273; decided that where there is an appropriation bankruptcy is not a revocation.

it being for his benefit; and whose subsequent assent would relate back to the transaction which required the assent.

See 3 Meriv. 652; 14 East, 582.

CROWFOOT *v.* GURNEY, M. T. 1832. C. P. 9 *Bing.* 372; S. C. 2 *M. & Scott*, 473.

Or money, though the money be not paid over, does not pass to the assignees.

A. being indebted to B., and an unascertained balance being due from C. to A.; A., by letter, requested C. to pay such balance to B.; C., by letter consented to do so, on the amount being ascertained; after the amount was ascertained, but before it was paid to B., A. became a bankrupt.

The Court held that the above circumstances amounted to an equitable assignment to B. of the debt due from C. to A., and that the assignees under the commission against A., standing in the same situation as the bankrupt himself, could not maintain an action against C. for the amount.

2. *With respect to Bankers*.*

3. *With respect to Bonds.*

DANGERFIELD *v.* THOMAS, M. T. 1838. Q. B. 1 *P. & D.* 287; S. C. 9 *A. & E.* 292.

An assignment of a bond divests the assignees of their right to the bond.

IN debt on bond, plea averring the bankruptcy of the plaintiff and appointment of assignees, who, by reason of the premises, became entitled to the bond debt; Replication, that the plaintiff had by indenture assigned the bond as a further security for a debt, with a proviso for redemption, and that the action was brought for the benefit of such creditor.

On special demurrer, the Court held, that the replication properly stated facts, shewing that the bond did not vest in the bankrupt's assignees.

4. *With respect to Building Contracts.*

TRIPP *v.* ARMITAGE, E. T. 1837. Ex. 4 *M. & W.* 687.

Under a contract that a builder is to be paid as the work is fixed and approved; that if he becomes bankrupt the contract is to be void:—Held, that property on his employer's premises passed if not fixed.

A BUILDER entered into a contract with the defendants for preparing and fixing certain works, and for which he was to be paid on being fixed and approved of by the surveyor; and the contract contained a stipulation, that, if the builder should become bankrupt, the defendants might take possession of the work then already done, and avoid and put an end to the agreement, and should pay so much as should be adjudged the fair worth of the work actually done and fixed; and certain sashes having been made and approved of, and taken to the premises, where pulleys, the property of the defendants, were added, but before being fixed the builder became bankrupt, after having received advances beyond the amount of the work certified to have been done.

* On the bankruptcy of a banker, bills paid in merely to present, and which have not been presented, do not pass to the assignees; but the proceeds of those which have been presented and paid before the bankruptcy, pass to the assignees. (Lord Tenterden, C. J.—*Tennant v. Strachan*, T. T. 1829, N. P., 4 *C. & P.* 31). And in an action of trover for the bills, if the assignees claim a right to retain the bills, it is *prima facie* an admission that the bills were paid in by the plaintiff.—*Ib.*

The Court held, that the property in the sashes remained in the bankrupt, notwithstanding the approval and addition made of the pulleys thereto, and that the assignees, after demand and unqualified refusal, might maintain trover for the sashes.

CLARKE *v.* SPENCE, E. T. 1836. K. B. 4 *A. & E.* 448; S. C. 6 *N. & M.* 399.

IN an action of trover, it appeared that A. contracted to build a ship for B., according to certain specifications, under the superintendence of B.'s surveyor, C., the price to be paid by instalments at prescribed stages of the work. After two of these instalments had been paid, and before the third became due, a fiat in bankruptcy issued against A., the assignees under which proceeded with the building of the ship, but would not allow C. to superintend the work. The third and succeeding instalments, and also the balance due upon the completion of the ship, were tendered by B. and refused by the assignees, who ultimately sold the ship to D.

The Court held, 1st, that the general property in the ship had sufficiently vested in B. to enable him to maintain trover against the assignees. And, 2ndly, upon the statute 6 Geo. 4, c. 16, s. 72, with respect to reputed ownership, in cases of bankruptcy, they stated—It is sufficient to say, that this case is plainly not within the statute; for although the plaintiffs were the true owners of the vessel, yet it was not in the possession, order, or disposition of the bankrupt, within that section, any more than a vessel or other article sent to a builder or manufacturer to be repaired is within it.

Pending building a ship the builder became bankrupt; several instalments had been paid:—Held, upon payment of the arrears of the instalments, the employer was entitled to the ship.

5. *With respect to Choses in Action.*

DEAN *v.* JAMES, H. T. 1833. K. B. 1 *N. & M.* 392; S. C. 1 *A. & E.* 809.

Per Lord Tenterden.—Where a debt is assigned to a third party, or released to a co-debtor, without notice to the debtor, the assignor is still to be deemed to have the order and disposition of such debt within the bankrupt acts, and an allegation in a plea, that the debt has been assigned, does not imply such notice to have been given.

Where a debt is assigned or released to a co-debtor, without notice to the debtor, the assignor is deemed to have the disposition, &c.*

6. *With respect to the Right to Damages.*

WRIGHT *v.* FAIRFIELD, T. T. 1831. K. B. 2 *B. & Ad.* 727.

THE declaration stated, that the bankrupt had entered into a contract with persons on behalf of his Majesty to furnish stone and execute masonry, as was specified in the said contract, for reward to him in that behalf, it being among other things agreed, that, on default made by the bankrupt in providing such stone, the other party might determine the contract. That the bankrupt, being desirous of obtaining stone for the above purpose, contracted for a

The right of action for unliquidated damages passes to the assignees.

* A chose in action vests in the assignor until notice to the debtor, he having the order and disposition of the debt; and, therefore, passes to the assignees. (*Buck v. Lee*, T. T. 1834, K. B., 3 *N. & M.* 580; *Abr. post, tit. Insolvent Debtor*.)

quantity of stone with the defendant, to be delivered within a specified time, upon certain terms, and at a certain rate; and that, in consideration of the promise of the bankrupt to perform the agreement on his part, the defendant promised to fulfil the same on his; that the bankrupt performed, and was ready to perform the several matters by him promised, but that the stone was not delivered by the defendant; by reason whereof the bankrupt, before his bankruptcy, became and was unable to fulfil his contract.

Per Cur.—The contract declared upon in this action was one immediately affecting the bankrupt's estate. The interest he had in the contract during his solvency might be regarded as part of the estate; and we should consider the right of the assignees, in respect of that interest, as coming within the description of "present and future personal estate," rather than that of "debts." It is true, the damages were unliquidated, but the claim to them, when they should be ascertained by verdict, was not the less vested in the assignees, and therefore passed with the estate, though the damages were not liquidated at the time of the bankruptcy.

See Branden v. Pite, 2 *H. Bl.* 308, n.; 17 *Ves.* 338, 343.

7. *With respect to Fixtures.* See also, pp. 73, 74.

CLARK v. CROWNSHAW, T. T. 1832. K. B. 3 *B. & Ad.* 804.

Fixtures, which the lessor has a right to take at a valuation at the end of the lease, do not pass on the tenant becoming bankrupt.

FIXTURES on iron works, machinery, and tools, had been sold to parties about to take a lease thereof, with covenants for the lessor, upon notice, to have them at a valuation at the end of the lease; and the defendant, one of the lessees, upon quitting the concern, assigned, by way of mortgage, all his estate and interest in the works, and fixtures, machinery, and tools, to the continuing partner, with right of entry in default of certain payments; and the latter continued in possession until his bankruptcy:—

Held, that the Fixtures did not pass to the assignees, as in the reputed ownership of the bankrupt, but that the movable property did.

See Horn v. Baker, 9 *East*, 215.

8. *With respect to Policies of Insurance.*

ALSAGER v. SPALDING, E. T. 1838. C. P. 4 *Bing. N. S.* 407.

A policy of insurance, given to a creditor as a security, passes to his assignees.

THE bankrupt had assigned a life policy to the defendants, as a collateral security for a debt, and becoming embarrassed, proposed a composition to his creditors, some of whom refused to assent, unless the defendants signed the deed. The defendants refused, unless the policy was assigned to them at the office value; and this being assented to, they received composition notes with the other creditors, who signed the deed in ignorance of the assignment of the policy. Upon the dropping of the life insured and the receipt of the money from the office by the defendants:—

Held, that the assignees of the trader who had become bankrupt were entitled to recover from the defendants the sum which they had received from the office, deducting the premium which they had paid.

See Schondles v. Wace, 1 *Campb.* 487.

CLAY v. HARRISON, M. T. 1829. K. B. 10 B. & C. 99.

IN an action on a policy of insurance by the assignees of a bankrupt, it appeared that A., in England, contracted with B., at Peterburgh, to send him a cargo of deals, to be paid for by a bill at three months, which he duly accepted. The deals were shipped, and A. effected an insurance. The ship was stranded on the voyage near Elsinore, and the deals were saved, but so much injured as not to be worth sending for. A., on hearing of the accident, gave the underwriters notice of abandonment the day before the bill became due, which they refused to honour. B.'s agent stopped the goods in transitu at Elsinore, A. having become insolvent—

But, where the bankrupt, at the time of his bankruptcy, had not an insurable interest, the assignees cannot recover on the policy.

The Court held, that, under the peculiar circumstances of the present case, the bankrupt, after the stoppage in transitu, had no property in the goods insured; and, therefore, the action could not be supported.

POWER v. BUTCHER, M. T. 1829. K. B. 10 B. & C. 329; Abr. post, tit. *Insurance*.

IN this case the Court said, an insurance broker who has effected policies is, in general, entitled to recover from the assured the amount of the premiums; although, in point of fact, he may not have paid them to the assurer. The admission in the policy of the receipt of the premiums by the assurer, is sufficient to protect the assured.

The assignees of an insurance broker may recover from the assured premiums he has covenanted to pay.

This general rule is not altered by the circumstance of the insurance broker having entered into a covenant with the assurer to pay the premiums; and, in such a case, the assignees of the bankrupt broker were entitled to recover from the assured the amount of premiums which, as between the assurer and the assured, would, in point of law, be considered as paid; although, in fact, the broker had not paid them.

9. *With respect to Leases.*

SINCLAIR v. STEVENSON, H. T. 1825. C. P. 10 Moore, 46; S. C. 2 Bing. 514.

A. by deed conveyed certain premises to B., on condition of his paying certain sums by way of rent for four years, by half-yearly payments, the whole of which rent would amount to the value of the premises; and the deed contained a clause of re-entry by A. in case the rent should be in arrear, or non-performance of the covenants therein contained by B., in which case he might take possession of the premises and sell the same, and pay the overplus, if any, to B. The Court held, that this deed was usurious; and B., having been let into the premises under it, and continued in possession four months, when he became bankrupt, that the property passed to his assignees under the 21 Jac. 1, c. 19.

Where the possession of property was given under an instrument apparently a lease, but in fact an agreement to secure the settler the sum to be paid for the property, with usurious interest, it passed to the assignees.

DOE d. PLEVIN v. BROWN, M. T. 1837. K. B. 7 Ad. & E. 447.

IN ejectment, it appeared, that A. demised lands to B., and afterwards executed a deed of trust, whereby he conveyed all his property to trustees for the benefit of his creditors. After the ex-

A. devised premises to B., and then assigned

then assigned them to C., guaranteeing B. to give C. 1s., as an acknowledgment; whilst B. was still in possession A. became bankrupt—Held, the assignment was void against A.'s assignees.

execution of the deed of trust, a fiat of bankruptcy issued against A.; the trustees of A. informed B. of the conveyance, and requested him to attorn tenant to the trustees. He at first refused to acknowledge their title, but he afterwards paid to them 1s. by way of acknowledgment; B. subsequently paid the trustees the rent for the current half-year. They then proposed to raise his rent, and on his refusing to pay any additional sum, gave him a notice to quit; whereupon he signed a memorandum in which he agreed to give up the possession to them:—Held, under these circumstances, that neither he nor the assignees of the bankrupt who defended as landlord, were prevented from shewing, in an action of ejectment by the trustees, that they had no title in consequence of the bankruptcy.

10. *With respect to where there is a Lien.*

CROWFOOT *v.* LONDON DOCK COMPANY, T. T. 1835. Ex.
4 Ty. 967.

Under an agreement by a builder that an engine, &c., should remain on his employer's premises as a security for advances, the latter has a lien against the assignees*.

IN *trover*, by the assignees of a bankrupt against the defendants, it appeared, that in a contract between the London Dock Company and R. S., the latter agreed to execute certain works, and to provide materials, labour, engines, tools, implements, &c., and it was stipulated, that the company's engineer should have the power of rejecting any materials or work, which, in his opinion, should not be in conformity with the contract, and that the directors should be at liberty to alter the plans, and add to or diminish any part of the intended works; in which case a proportionate addition or deduction should be made to or from the sum to be paid to R. S., the amount to be computed according to a schedule of prices contained in the specification. R. S. inclosed land of the company so as to exclude the public, had the premises watched by persons in his own employ, and erected steam engines, and placed implements and materials thereon for the purpose of carrying on the works; but the company's engineer was on the premises every day, superintending the works during their progress, and rejected such materials as he did not approve of. R. S., after some time, by letters, in which he referred to and enumerated the machinery and materials he had placed upon the premises, applied for and obtained advances from the company upon the faith of his agreement, that the engines, implements, and materials, then on, or afterwards to be brought on the premises, should be a security. The amount of those advances always exceeded the value of the property on the premises. R. S., having become bankrupt, the company erased his marks on the engines, implements, and materials on the premises, and substituted their own.

* After notice of an act of bankruptcy, A., who was possessed of deeds belonging to B., the bankrupt, claimed a lien on them. B., to regain possession of them, paid the lien. The assignees may, in an action for money had and received against A., raise the question, whether the sum claimed was fair and reasonable. (Lord Tenterden, C. J., *Noble v. Kersey*, M. T. 1829, N. P., 4 C. & P. 90. A., a trader, became bankrupt. A. was possessed of some of his goods, on which B. claimed a lien: they were afterwards sold with the trader's goods without the sanction of the assignees, but no auction duty was paid:—Held, that the assignees might sue B. for the goods, and that the sale was no admission of A.'s right. (*Tindal, C. J.—Bleaden v. Hancock*, M. T. 1829, N. P., M. & Malk. 465.)

The Court held, that the effect of the bankrupt's agreement was to give the defendants a lien, which, under the circumstances, they had a sufficient possession to support.

HALL *v.* BARNARD, T. T. 1824. N. P. 1 C. & P. 382.

THE bankrupt was a bill broker, and the defendants were bankers. The bankrupt, after he had committed an act of bankruptcy, had sent these bills to the defendants, who were creditors; but it appeared, that the bankrupt had only lent money on some of the bills, and had not either discounted or paid the full value for them.

Abbott, C. J.—He has a *lien* on them to a certain extent, which passes to the assignees, and enables them to recover the bills from a wrong doer in an action of trover. Whether they can keep the whole amount is quite another thing.

Chattels parted with by a trader after the committing of an act of bankruptcy, on which he has a lien, may be recovered back in trover.

WOOD *v.* GRIMWOOD, E. T. 1830. K. B. 10 B. & C. 679.

THE defendant had, upon an advance of money, received the title deeds of an estate about to be purchased by the mortgagor, untainted with any usurious consideration, and, previous to the conveyance of the estate, insisted upon the mortgagor purchasing goods at a price above their value as a bonus, or otherwise he would not continue the mortgage:—Held, that the original possession of the title-deeds, being good, gave him a right to the estate whenever it should be conveyed to the mortgagor; and that the assignees of the latter could not maintain trover, even for the latter conveyance.

A. agrees to purchase an estate from B., and borrows £— of C., to whom the title deeds were given before the completion of the sale. A. became bankrupt:—Held, that C. was entitled to the deeds.

HEWISON *v.* GUTHRIE, E. T. 1836. C. P. 2 Bing. N. C. 755; S. C. 3 Scott, 298.

IN trover by the assignees and solvent partner of a bankrupt, for the value of a policy of insurance, effected by the bankrupt, and in the possession of the defendant, an insurance broker, who pleaded a right of lien for a debt, under the custom of trade, it appeared that the defendant had taken a bill of exchange, payable at a future time, as security for the debt.

But taking a security, as a bill of exchange, waives the right to a lien in case of bankruptcy.

Per Cur.—It is well established, that, if a security is taken for the debt, for which the party has a lien upon property of the debtor, such security being payable at a distant day, the lien is gone.

11. *With respect to Machinery.*

TRAPPES *v.* HARTER, M. T. 1833. Ex. 2 Cr. & M. 153; S. C. 3 Tyr. 603.

IN trover against the assignees of bankrupts, calico printers, for all the machinery, utensils, and fixtures erected and used by the bankrupts in their print-works.

The Court held, that machinery erected for the purpose of carrying on trade, which might be removed without injury to the freehold, being merely fixed by screws and bolts, passed to the assignees where the machinery appears to have been in the possession of the bankrupts as reputed owners, and they obtained credit from its possession. As between landlord and tenant, this machinery might be

Trading machinery, though erected so as to be attached to the freehold, will pass if commonly removable.

removed. As between heir and executor, it would have passed to the executor, and not to the heir; and we are of opinion, that it passed to the assignees.

COOMBS *v.* BEAUMONT, T. T. 1833. K. B. 5 B. & Ad. 72; S. C. 2 N. & M. 235.

But a steam engine, attached to the freehold, and demised, does not pass.

THIS was an action of trover for the value of a certain steam engine, frames, and weighing-machines. The property in dispute was the stock and furniture belonging to a house rented by the bankrupt of a person under whom the defendant acted as agent in taking them after an act of bankruptcy. By the terms of the lease, all the property belonged to the landlord; and it was provided, that the lessee should only have the use of them during the time. This property, except the steam engine, was all of a movable nature. The steam engine was fixed into the freehold.

The Court, upon the authority of *Horn v. Baker*, 9 East, 215, intimated an opinion, that the steam engine thus affixed did not pass to the assignees.

STORER *v.* HUNTER, T. T. 1824. K. B. 3 B. & C. 363; S. C. 5 D. & R. 240.

So, machinery leased with a colliery does not pass as goods in the order and disposition of the bankrupt.

IN trover, it appeared, that the owner of two collieries let them in 1810, on lease, to a tenant, for twenty-one years, together with the engines, machinery, &c. A valuation of the machinery, &c., was made, and the tenant was to put up what new machinery might be necessary; and it was agreed, that, three months before the expiration of the lease, another valuation of the machinery, &c., should be made, and, according as it was less or more than the original valuation, the tenant should pay or receive the difference to or from the landlord. There was a covenant for re-entry in the event of the non-payment of rent. The tenant put up new machinery, and in Trinity Term, 1818, the landlord obtained judgment in an ejectment for non-payment of rent, but did not take possession until the 8th November, 1819; and on the 10th November, the tenant committed an act of bankruptcy. His assignees brought an action of trover for the machinery, &c., as being in the disposition of the bankrupt under 21 Jac. 1, c. 19. The Court held, first, that the landlord had a right to the new and old machinery, although no valuation was made three months before he took possession; secondly, that the tenant never had the disposition of the machinery, &c., under this lease, within the meaning of 21 Jac. 1, c. 19; and, thirdly, that no difference was made by the judgment in ejectment, as it did not give the right to the property, but only the possession of it.

See 9 East, 215; 1 B. & C. 308, 568.

FAIRBURN *v.* EASTWOOD, T. T. 1840. Ex. 6 M. & W. 679.

But where A. leased valued machinery to B. for a term, under a covenant, that, if its value increased, A. was to pay B. the differ-

IN trover, it appeared, that, by indenture of demise, the defendants leased to J. E. and J. W., for twenty-four years, a fulling-mill and machinery. The lease, after reciting that the machinery had been valued at a certain sum, contained covenants, that, at the end or sooner determination of the term, the machinery should be again valued by two indifferent persons, one to be chosen by the lessees, and the other by the lessors; and that, according as the second valua-

tion exceeded or fell short of the first, the lessors were to pay or receive the difference. A fiat in bankruptcy afterwards issued against J. E. and J. W., during the continuance of the term, under which the plaintiffs were appointed assignees. The plaintiffs declined to take the lease, but they required the defendants to appoint a person to value the machinery, and, upon their refusal, appointed one themselves, who valued the property at an amount exceeding the original valuation. They then delivered possession of the premises to the defendants, the machinery being still therein, and demanded the difference between the two valuations, which the defendants refused to pay. The plaintiffs afterwards demanded the goods, and, on the defendants refusing to deliver them—

Per Cur.—Under the terms of the lease, the lessors were to have possession of the goods, paying to the lessees the difference between their increased value and the value at the commencement of the lease. The lessees, then, are possessed of the machinery, subject to the covenants; they become bankrupts, and, according to the case of *Kearsey v. Carstairs*, 2 B. & Ad. 716, are discharged from their covenants. The assignees then hold the property discharged from the bankrupt's covenants. They put the landlord into possession of the premises, and the latter decline to make any contract for the purchase of the machinery. The assignees cannot bring an action of covenant against the landlords, for no covenant was made with them. But they were entitled to get back the goods which were deposited on the premises. And, therefore, trover may be supported.

ence; if its value diminished, then B. was to pay A. Its value increased. B. became bankrupt. The assignees appointed a valuer; demanded the increased value, returning the lease to A., who refused to pay it:—Held, that trover would lie by the assignees for the machinery.

12. *With respect to Mortgagees.*

HITCHMAN v. WALTON, M. T. 1838. Ex. 4 M. & W. 409.

In an action of trover, it appeared, that premises, with fixtures, were mortgaged, but the mortgagor continued in possession, and, becoming bankrupt, his assignees removed the fixtures.

The Court held, that the mortgagee, as against the defendants, as strangers, was entitled to consider the mortgagor as his tenant at will, and maintain an action for the injury to his reversionary interest; held, also, that, having the same right to the fixtures as his tenant, he might maintain trover for the fixtures so removed, and that they did not pass to the assignees as goods within the bankrupt's order and disposition.

As the mortgagee is entitled to consider the mortgagor as his tenant, fixtures in the possession of the latter do not pass.

DUNN v. MASSEY, E. T. 1837. K. B. 1 N. & P. 578; S. C. 6 A. & E. 479.

THE mortgagor became bankrupt, and, after forfeiture, the assignees tendered the principal and interest, and then brought trover for the title-deeds.

The Court held, upon the construction of s. 70 of 6 Geo. 4, c. 16, that assignees tendering the principal and interest of mortgaged estates of the bankrupt after the day of payment, could not maintain trover for the title-deeds.

Where a mortgage is forfeited, the assignees of the mortgagor cannot tender the mortgage money and interest, so as to bring trover for the deeds.

SUMPTER *v.* COOPER, E. T. 1831. K. B. 2 B. & Ad. 223.

Where a debtor assigned to his creditor the title-deeds of houses, but the assignment was not registered under 7 Anne:—Held, that, although the assignment was void, the debtor's assignees could not recover from the creditor the rents received by him.

THE defendant and the bankrupt, in 1817, became the purchasers, in equal shares, of some houses in Middlesex, and took a conveyance, which was left in the hands of the attorney, whom they employed.

The bankrupt, becoming embarrassed in his circumstances, executed to the defendant, in March, 1828, an assignment of his share of the premises. The circumstances under which that assignment was made were such as to amount to a fraudulent preference. The deed itself was never registered. The assignment to the plaintiffs, as assignees, was registered pursuant to the stat. 7 Ann. c. 20. The defendant had received the whole of the rents from March, 1828; this action was brought for half.

Per Cur.—We have made inquiry, and we are satisfied that an equitable mortgagee is entitled to receive the rents, and, in equity, to hold them against the mortgagor. It follows, that the assignees, who claim through the mortgagor, are not entitled to maintain an action for money had and received for those rents. The Registry Act cannot affect the defendant's right as equitable mortgagee. It cannot apply to a mere lien, created by the mere deposit of title-deeds; there is no deed to register.

13. *With respect to Patents.*

BLOXAM *v.* ELSEE, H. T. 1827. K. B. 6 B. & C. 169; S. C. 1 C. & P. 558; S. C. 9 D. & R. 215; S. C. R. & M. 187.

An assignment under a commission of a patent, limited by statute to the benefit of five persons, legally passes, notwithstanding the restriction.

A PRIVATE act for extending the privilege of a patent provided, that the privileges, &c., should become void in case of their being assigned and becoming vested in more than five persons, or their representatives, otherwise than by devise or succession; and the patentee having become bankrupt, creditors, exceeding five in number, proved under the commission:—Held, that the provision applied only to an assignment by the act of the party, not by operation of law; and that the interest vested in the assignees.

See *Hesse v. Stevenson*, 3 B. & P. 565; *Godson on Patents*, 219.

14. *With respect to Pensions*.*

GIBSON *v.* EAST INDIA COMPANY, H. T. 1839. C. P. 5 Bing. N. S. 262; S. C. 7 Scott, 74.

The pension, given by the East India Company to an officer does not

THE plaintiffs, as assignees, sued the East India Company for the allowance given by the Company to an officer, the bankrupt, upon his retirement from service, upon the ground that the pension did pass to the plaintiffs as assignees.

* All offices, touching or concerning the administration or execution of justice, are not saleable, as the stat. 5 & 6 Edw. 6, c. 16, has expressly prohibited the sale of such offices. Hence, the office of serjeant-at-mace, (*Lonfield's case*, 1 Atk. 212), or of sworn clerk of the Six Clerks' Office, (*Bristow's case*, 1 Atk. 212), or the place of a jew-broker, duly licensed by the Court of Aldermen, (*Ex parte Lyons*, Amb. 89); or a commission in the army, whether the officer be on whole, (1 H. Bl. 627), or half-pay; (3 B. & P. 328); or pay to become, or pay

Per Cur.—Many grounds of inexpediency in allowing a claim of the present description to be recoverable in a court of law readily suggest themselves. If the retired pension, which is given for former services, can be recovered by action, why should not the pay and allowance for actual service be equally so during their continuance? And yet how frequently is it not only expedient, but absolutely necessary, that military pay should be suspended and kept in arrear beyond the day when it becomes due, and until the service, in respect of which it is earned, has been entirely completed; not to mention the expense and inconvenience which must arise, if a suit might be instituted by each individual officer, and the prejudice which such litigation would necessarily occasion to the military service. But if the allowance of this pension will furnish a ground of action against the Company, no legal distinction can be assigned why the grant of pay during actual service, which is authorized by general orders founded on resolutions of the Directors, confirmed in the same manner by the Board of Commissioners, should not be equally the ground of an action at law. It is enough, however, to say, that though the Company undoubtedly might, if they had thought proper, have made a grant under their common seal for the payment of this pension, by which they would have rendered themselves liable to an action in a court of law, yet they have not so done, and consequently that it must be governed by the general rule of law, that a corporation aggregate cannot be sued upon a contract not being under their common seal. We therefore think the bankrupt himself could not have had a right of action against the Company; and that, consequently, no such right has passed to his assignees, and therefore we give judgment of nonsuit.

pass, if not by grant under seal.

15. *With respect to Ships and Shipments.*

MORTIMER v. FLEMING, E. T. 1825. K. B. 4 B. & C. 120.

A., the bankrupt, had agreed with B. for the absolute purchase of a ship, but being unable to pay for it, it was stipulated, that the sale should be deferred until he could pay the purchase-money, and that B. should continue the legal owner, and responsible for her outfit on an intended voyage under A.'s command, and for his profit; with covenants by A. to repay to B. all charges of outfit, port duties, insurances, &c., as also the purchase-money by instalments. At the time of the agreement the ship was in her port of register; no indorsement was ever made on the certificate, but A. took possession, and proceeded on the voyage with a cargo on his own account, and subsequently paid two of the instalments; he also delivered to B. a bill of lading, which was consigned by him to foreign merchants at M., where the goods had been left. A. then proceeded to E., where he actually due; (3 B. & P. 328); are not assignable, and, consequently, not distributable under a commission.

But the office of under-marshal of the city of London may be sold, (*Ex parte Butler*, Amb. 73; 1 Atk. 210), it not being within the statute of Edward, but concerning only the police of the city; and one of the gentlemen pensioners having become bankrupt, he was ordered to resign in favour of the nominee of the assignees. (*Ex parte Joynes*, 1 Cooke, B. L. 316, 8th edit.; *Ex parte Gilbee*, Ibid.). And the office of taking care of the Palace and House of Lords has been holden to pass to the creditors. (*Schelinger v. Blackerby*, 1 Ves. 347). So if a life-guardsmen be a bankrupt, it has been said that his pay is distributable under the commission. (3 T. R. 681). So an office, which the officer holds *quamdiu se bene gesserit*, may be distributed under the commission. (1 Atk. 210, 211).

The ship registry acts apply to an executory contract, and, therefore, where an indorsement was not made on the registry of such a contract, the ship passes to the assignees of the vendor.

abandoned the command and became bankrupt, having never completed the purchase, nor paid the residue.

The Court held, first, that such an executory contract was within 34 Geo. 3, c. 68, and was void for want of compliance with the provisions of that act; and therefore the bankrupt's property therein passed to the assignees.

BELCHER v. OLDFIELD, M. T. 1839. C. P. 6 *Bing. N. S.* 102.

Where the captain of a ship takes the cabins for passengers, and is to pay a certain sum to the owners, and the captain fits them up, and during the voyage resigns his command to the mate:—Held, on his bankruptcy, the furniture, &c., did not pass.

By the terms of an agreement between the bankrupt and the defendant, the bankrupt was to take the command of a ship, of which the defendant was owner, on a voyage to India and home, the cabin furniture and stores, &c., being the property of the bankrupt. Upon the arrival of the vessel, on the outward voyage, at Algoa Bay, the bankrupt abandoned her for the purpose of attending to his private concerns, and resigned the command to the first mate, to whom he gave directions and communicated the owner's instructions. The vessel completed the voyage out and home under the command of the mate, who received a letter on the homeward voyage from the defendant, confirming him in the command, directing him not to receive the bankrupt on board, except as a passenger, informing him that the bankrupt was deeply in his debt, and charging him to retain all the bankrupt's effects, &c., in his possession. Previous to the arrival of the vessel at the port of London, the defendant and the bankrupt being in personal communication, the latter, being pressed for a settlement, wrote the following letter to the defendant:—I hereby authorize and require you to keep possession of all cabin furniture, and other property of mine, on board the vessel when she arrives, and to place the value of the same to the credit of my account with you. Shortly after, and a few days before the arrival of the vessel, the bankruptcy took place. In trover by the assignees for the value of the furniture and stores—

The Court held, that the letter was equivalent to an equitable assignment, and gave the defendant an equitable lien upon the furniture, stores, &c., then in his possession, through the instrumentality of the mate, who took the command of the vessel, and possession of every thing it contained, as his agent, and not as agent of the bankrupt, and consequently that the defendant was entitled to retain against the assignees of the bankrupt.

Where the proceeds of a whale fishery were to be divided among the part owners, subject to the ship's disbursements:—

Held, upon the bankruptcy of one, that his assignees could not recover until the ship-charges were paid.

HOLDERNESS v. SHACKELS, M. T. 1828. K. B. 8 *B. & C.* 612.

SEVERAL parties engaged in a joint adventure in the whale fishery, deposited the proceeds in a warehouse, and the share of each was separated in bulk, and remained at the disposal of each by delivery orders, but subject to be retained until the ship's husband had been satisfied all expenses of the adventure.

The Court held, first, that it was to be deemed, not an absolute but a qualified appropriation; secondly, that, upon the general account between one of the partners and the ship's husband, such partner being found to be indebted to the other part owners who were liable to pay the expenses incurred, the assignees of such partner could not maintain an action for the bankrupt's share, until they had ascertained what was due from him to the partnership.

KYMER *v.* LARKIN, T. T. 1828. C. P. 5 *Bing.* 71; S. C. 2 *M. & P.* 183.

THE charterer, after arrival at the foreign port, assigned the cargo as a security for the repayment of advances, and subsequently became bankrupt; and by the same deed, he and the assignees appointed an agent to receive the proceeds, and to act generally in reference to the charter-party; the captain having attached the ship for the outward freight and for a penalty, and the agent not providing a home cargo according to the charter-party, the captain procured it for the owners, and received the freight thereon.

Held, that the assignees of the charterer could neither recover the proceeds of the attachment, nor the homeward freight.

B. shipped a cargo to C., at which place defendant attached it for the freight; afterwards B. became bankrupt:—Held, that the cargo did not pass to the assignees.

16. *With respect to Property the Bankrupt holds in autre droit.*
1st.—*As Agent.*

STAFFORD *v.* CLARK, M. T. 1823. N. P. 1 *C. & P.* 24.

TROVER, by assignees. It appeared when the bankrupt failed, (but some time before the commission was taken out), his father employed him to carry on business for him as his servant, and bought furniture for the house where that was carried on.

Per Burrough, J.—If the bankrupt was really the servant of his father, these goods cannot be recovered by the assignees.

Goods intrusted with an agent or servant, for the purposes of sale only, do not pass on the servant becoming bankrupt.

SHAW *v.* DARTNALL, M. T. 1826. K. B. 6 *B. & C.* 56.

ANNUITY brokers (become bankrupts) had in their accounts and pass-book given the grantee credit for sums as received on account of annuities:—Held, that they could not afterwards be allowed to say they had not. But with respect to sums entered to his credit, but minuted in the entry “as not received,” and also with respect to other sums originally credited, but as to which there was evidence of his subsequent assent to their being replaced to his debit, by filing his bill against the grantor, and exhibiting an affidavit in support of it that the grantor was indebted to him—

Held, that the assignees were entitled to withdraw them from his credit, and be allowed them in the account.

A., an agent, received an annuity for B., in his account he gave credit for a payment not received:—Held, that A.’s assignees were entitled to be allowed that sum in account with the grantees.

POPE *v.* BIGGS, H. T. 1829. K. B. 9 *B. & C.* 245.

IN an action by the assignees of a mortgagor against a party who had been employed to receive the rent of lessees of premises demised since the mortgage, and pay over the interest to the mortgagees—

The Court held, that the mortgagees, by giving notice of the mortgages to the tenants, entitled themselves as well to by-gone rents not actually paid over to the mortgagor by the agent, as well as to future accruing rents, even though the agent becomes bankrupt.

Where the mortgagee gave notice to the tenant to pay him the rents, &c., and employed an agent, who received the money, on his bankruptcy it does not pass to the assignees.

2nd.—*As Bailee.*

NEWPORT *v.* HOLLINGS, 1827. N. P. 3 *C. & P.* 223.

THE bankrupt, an innkeeper, had borrowed a chaise from the plaintiff, a coachmaker, while a new one was building; it was used in

A chaise borrowed by an

innkeeper, while a new one is being built, his name not being put on it, does not pass.

the course of his trade, but he did not have his name painted upon it, under the stat. 4 Geo. 4, c. 6, s. 11.

Vaughan, J., held, that this was not such a reputed ownership of the borrowed chaise, as could entitle the assignees of the innkeeper to detain it from the coachmaker.

The jury found a verdict for the plaintiff. On motion for a new trial, the rule was refused.

HICKENBOTHAM v. GROVES, M. T. 1826. N. P. 2 C. & P. 492.

Goods let with a furnished house will pass, if the tenant is held out to the world as the reputed owner and obtain credit by the possession of them.

A. LET a house to B., with a covenant that the lease should determine on B. committing any act of bankruptcy, on which a commission of bankruptcy should issue; and, by another deed of the same date, A. grants the use of the furniture to B. in like manner, and with a similar covenant to allow A. to resume the possession of the furniture on the commission of an act of bankruptcy. B. becoming bankrupt, the jury found that B. was the reputed owner of the furniture.

The Court held, that the furniture, &c., passed to the assignees, notwithstanding these covenants; and if it were proved, on the one side, that several of the servants of B., and many of his customers, knew that the goods belonged to A.; and, on the other side, several of B.'s prove that they considered the goods to belong to B., and gave him credit upon the faith of them, and that he acted as master of the house, &c., it will be for the jury to say whether B. was held out to the world as the owner of the goods, and obtained credit by the possession of them.

See 1 *M. & Selw.* 335; 1 *B. & P.* 13, 82; 2 *D. & R.* 495; S. C. 1 *B. & C.* 318.

3rd.—*As Executor.*

COOPER v. DE TASTET, M. T. 1831. C. P. 2 *M. & Scott*, 714.

Shares, which a bankrupt, from a public company's book, appears only to take as executor, do not pass*.

THE only evidence of fixing the bankrupt as in the apparent ownership of certain shares, which were originally the property of his father, to whom he was executor, was the transfer book of the company, in which he appeared to take them only as executor, the words "sell and assign" having been struck out; which was proved to be always done, unless the *transfer* was *bonâ fide* and for a money consideration; and the jury having, on an issue directed, found a verdict for the plaintiffs (the executors)—

The Court refused to disturb the verdict.

4th.—*As Husband.*

MICHELL v. HUGHES, T. T. 1830. C. P. 6 *Bing.* 689; S. C. 4 *M. & P.* 577.

A right by husband and wife,

To a writ of entry sur abatement, in the per, the defendant pleaded, *inter alia*, that one of the defendants, in the right of

* A term vested in an executor, as such, does not pass to the assignees on the bankruptcy of the executor, (*Parke, B.—Doe d. Williams v. Davies*, 1834, N. P., 6 C. & P. 614), unless the lease contains a clause that the lessor shall re-enter upon the bankruptcy of the "lessee, his executors, or administrators."

his wife, had become bankrupt, and that all his right, title, and interest passed to his assignees.

The Court held, that as, if the wife's seisin had been a seisin in fact, the husband would have become seised of the freehold in her right during the coverture; and that, under the bargain and sale, his assignees would have had the same right by analogy; therefore, where the abatement was made upon the wife, the right to bring the writ for the freehold, to which the husband would become entitled, would also pass to the assignees, and the count, in the bankrupt's own name, could not be supported.

in right of the wife, to bring a writ of entry *sur abatement*, passes, by the assignment, to the assignees of the husband, on his bankruptcy.

CAUNT *v.* WARD, T. T. 1831. C. P. 7 Bing. 608.

TESTATOR gave two annuities to two servants, and one having married during his life, he, by a codicil, directed it to be for her sole and separate use. The other legatee married after his death, and, upon the insolvency of her husband—

The Court held, that her annuity, not being affected with any restriction, passed to his assignees.

An annuity bequeathed to a wife, without restriction, passes to the assignees, on husband's bankruptcy.

DOE *d.* SHAW *v.* STEWARD, E. T. 1834. K. B. 3 N. & M. 372.

IN an action of ejectment, it appeared that A. bequeathed a house to B. for the residue of a term of years, if B. should so long continue to inhabit therein; and, after B.'s decease, or giving up the possession, A. bequeathed the house to C., the wife of B., for the remainder of the term, in case she should so long live therein and remain the widow of B., with further limitations to the issue. B. entered, with the assent of the executors of A. B., being in insolvent circumstances, went to sea for six months; C. continued to occupy the house and to carry on B.'s trade therein. During the absence of B., a commission of bankruptcy issues against him. After his return, B. continues the occupation and the business until the house is sold by his assignees, when B. and C. are turned out of possession by the vendee. B. dies; C., remaining a widow, demands possession:—

Held, that the bequest to C. did not, in equity, enure as a limitation to her separate benefit, and that her executory estate passed to the assignees of B., as being such an interest as B. could “lawfully depart withal.”

Under a devise of a house to B., and then to C., his wife, with limitation to their children, B. and C. took possession of the house. B. became bankrupt and died:—Held, that the house passed to his assignees.

DOE *d.* BAMBRIDGE *v.* STATHAM, M. T. 1825. K. B. 7 D. & R. 141.

AN estate was conveyed to husband and wife and their heirs, as joint tenants, “in consideration of 200*l.*, now in hand paid by husband and wife.” On the bankruptcy of the husband, evidence was adduced, in order to rebut the claim of the assignees, that the money for the property belonged to the wife, and was her separate property, and did not belong to the husband and wife.

The Court were of opinion, that the evidence was properly received.

To prevent the operation of the stat. 21 Jac. 1, it may be shewn that money for property was paid by wife, though the deed stated it to have been by husband and wife.

5th.—*As Trustee**.

6th.—*As Wharfinger.*

BODDY v. ESDAILE, M. T. 1823. N. P. 1 C. & P. 62.

Timber sent by a servant to a wharf to be sold does not pass, on bankruptcy of wharfinger.

TROVER for deals. The plaintiff had sent them to the bankrupt's wharf, and sent his servant with them, to look after them and sell them as he could get customers; but the servant always took the directions of the wharfinger as to whom he was to trust.

Burrough, J.—If the servant keep possession of the deals, it is clear that the bankrupt never had them in his possession; and, therefore, they could not be within the statute of James.

17. *With respect to Shares.*

DAWSON v. RISHWORTH, H. T. 1831. K. B. 1 B. & Ad. 574.

The assignees cannot maintain trover for shares in which the bankrupt has merely an equitable interest.

ONE of the defendants having become possessed of shares in a mining company, by the regulations of which it was necessary for him to sign the deed of association, and receive a certificate before a certain day; and he, residing in the country, directed his son, the other defendant, to sign the deed in his own name and receive the certificate, which he accordingly did; and, after his father's bankruptcy, sold them and paid over the whole proceeds to his father before any demand by the assignees.

The Court held, that as, after the execution of the deed, the father never had any legal property in the shares; and if the assignees had obtained possession of the certificate, they could only have compelled an assignment by the son in equity; they could not maintain trover for the certificate.

(c) IN RESPECT OF THE TIME OF THE ACT OF BANKRUPTCY.

1. *Acts of the Parties.*

1st.—*In general*†.

2nd.—*By Sales and Purchases*‡.

HILL v. FARNELL, H. T. 1829. K. B. 9 B. & C. 45.

Bonâ fide sales are protected,

THE defendant, after an act of bankruptcy unknown to him, and within two months of the issuing of the commission, purchased a

* By 6 Geo. 4, c. 16, s. 79, where the bankrupt is trustee of any real or personal estate, or has any government stock, or the stock of any public company, either in England, Scotland, or Ireland, standing in his name, the Chancellor may assign to other trustees.

† A dealing on the 14th March cannot be defeated by a commission issued 14th May. (*Cowie v. Harris*, M. T. 1827, N. P., 1 M. & M. 141). A commission superseded before gazetted or acted upon, and not issued after the two months, the transaction is not protected. (*Peckham v. Lashmoor*, M. T. 1828, N. P., 1 M. & M. 251). A transfer by mistake to a wrong person, but corrected within two months, passes to the party actually intended. (*Ibid*).

By 2 & 3 Vict. c. 29, all contracts made bonâ fide with any bankrupt, previous to the date and issuing of any fiat against him, to be valid, provided no notice of prior act of bankruptcy.

‡ See *supra*, 2 & 3 Vict. c. 29.

lot of books from the bankrupt, a hop-merchant, and paid him for them.

The Court held, that, upon the construction of the 6 Geo. 4, c. 16, s. 82, such payment was valid; and that the assignees could not rescind the contract, and maintain trover for the books, without an offer to return the money; and the same construction was to be applied in all cases of *bonâ fide* sales, whether the goods were such as the bankrupt usually dealt in or not.

though goods not the kind the bankrupt usually dealt in.

WARD *v.* CLARKE, H. T. 1830. N. P. 1 *M. & M.* 497.

THE petitioning creditor's debt accrued on the 4th of April, previous to which, as well as subsequently, acts of bankruptcy had been committed, and goods had been sold in three parcels, two before the 4th April, and the third on the 9th. In trover by the assignees, it was held, that they could only recover in cases where the bankrupt himself might impeach the transaction, unless the delivery were subsequent to the act of bankruptcy, after the petitioning creditor's debt accrued, and that they were entitled only to recover in respect of the third parcel, or where the price was suspiciously small.

But sales at prices suspiciously low are not protected.

PEARSON *v.* GRAHAM, T. T. 1838. K. B. 6 *Ad. & E.* 899; S. C. 2 *P. & D.* 636.

A TRADER absconded from his place of business, leaving an assistant there, who, *bonâ fide*, but without any express order, sold certain goods of the former, and received the money. More than two months afterwards, a commission of bankruptcy issued against the trader, upon the act of bankruptcy committed by his absconding.

The Court held, first, that such sale by the assistant was a conversion; secondly, that the property in the goods, by relation, passed to the assignees, it not having been shewn, on the trial, that the purchaser had no notice of a prior act of bankruptcy, so as to bring the transaction within the 6 Geo. 4, c. 16, s. 81, or the payment within section 82.

A party claiming under a sale from the bankrupt, must shew that it was without notice of an act of bankruptcy.

WINKS *v.* HASSALL, E. T. 1829. K. B. 9 *B. & C.* 372.

AGREEMENT, by a trader, for the purchase of two pipes of wine. They were lying in a bonded warehouse, in the names of two persons, who had given bond for the duties. It was part of the agreement, that the buyer should pay the duties. The seller gave to the buyer an order on the warehousemen to deliver the wine. There never was any actual delivery or transfer of the wine. The warehousemen, on the duties becoming payable, paid the duties, and were repaid by the seller, who thereupon wrote to the buyer, informing him that they had discharged the duties, and added the amount to the account, and requiring payment. The wines had now been removed to the warehouse of the warehousemen, who had thus given bond and paid the duties. The buyer sold one of the pipes of wine, and it was delivered to his order by the warehousemen, who charged him warehouse rent from the time of the purchase. The buyer afterwards became bankrupt, and, in an action of trover by his assignees against the warehousemen, to recover the other pipe—

Where a vendee of wine in bond becomes bankrupt, and the vendor has been obliged to pay the duty, the wine does not pass to the assignees until the duty has been paid by them.

The Court were of opinion, that they were not entitled to recover

without payment of the debt, for which the seller, through the warehousemen, had a lien.

TUCKER v. RUSTON, T. T. 1825. N. P. 2 C. & P. 86.

So, after the giving of a delivery order to a wharfinger, the property does not pass, though it be not re-weighed, or re-housed*.

GOODS had been housed, in February, in the bankrupt's name, at a wharf. On the 15th March, a delivery order was lodged with the wharfinger by the bankrupt, directing the goods to be delivered to the defendant. They were not re-weighed nor re-housed. On the 11th April, the vendor became bankrupt.

Best, C. J., was of opinion, that the goods were not in the order and disposition of the bankrupt, after the delivery order.

See 5 B. & A. 134; 15 East, 21.

CARTER v. BRETON, E. T. 1830. C. P. 6 Bing. 617; S. C. 4 M. & P. 424.

The 82nd section of the 6 Geo. 4, c. 16, does not extend to protect the delivery over of goods by the bankrupt, in discharge of previously existing obligations.

AFTER a secret act of bankruptcy, a trader induced a friend to accept a bill of exchange for his accommodation, and after the bill was accepted and delivered over, though on the same day, the trader agreed to sell to the acceptor four horses, for part of the sum for which the bill was accepted, and the horses were subsequently delivered, and the bill, when due, paid, the trader having become bankrupt:—It was held, that, as the acceptance was given without any reference to the sale of the horses, it was a transaction complete before the sale took place, and that the latter was, in effect, a sale of the horses, upon an agreement to set off their value against the liability of the bankrupt upon the bill, which could not be considered as a payment within the 82nd section of the 6 Geo. 4.

3rd.—*By Deed of Assignment.* See *div. Act of Bankruptcy.*

2. Acts of Law.

1st.—*Judgments†.*

2nd.—*Executions.*

1. Executions on Judgment before 2 & 3 Vict.

MORLAND v. PELLATT, M. T. 1828. K. B. 3 M. & R. 411; S. C. 8 B. & C. 722.

Before 2 & 3 Vict., an execution paid out the day before

IN ASSUMPSIT by assignees under a joint commission against two, to recover back money received and paid over by the sheriff under a fi. fa., issued upon judgment on a warrant of attorney: the money

* An agreement to accept bills for the bankrupt and receive the proceeds of the goods, will not afford an answer to an action of trover by assignees for property received after the bankruptcy. (*Carter v. Barclay*, 1820, N. P., 3 Stark. 43).

† A letter to a judgment creditor, stating, that, if he sued out execution, he would involve the debtor or derange the whole of his affairs, is not a notice of insolvency of the trader to preclude the creditor under 49 Geo. 3, c. 121, from levying his debt. (*Abraham v. George*, M. T. 1822, Ex., 11 Price, 423).

By 21 Jac. 1, c. 21, and 6 Geo. 4, c. 16, executions and attachments against property of bankrupts, levied more than two months, without notice, &c., shall be valid, notwithstanding any prior act of bankruptcy. And where a commission has been issued within two months, which is afterwards superseded, the two months shall be reckoned from the issuing of it. And, by 1 Will. 4, c. 7, post, judgments by cognovit, after declaration, are valid. But see 2 & 3 Vict. c. 39, post, p. 89.

was paid to the sheriff's officer on the 1st May, the writ being returnable on the 2nd May; on which day one of the parties committed an act of bankruptcy, and the other on the 25th; the commission issued on the 11th, and the sheriff paid over the money to the defendant.

an act of bankruptcy, was protected*.

The Court held, that, as the plaintiffs had not a complete title until the 5th, before which the writ was returnable, and on which day, if the sheriff had paid over the money as he ought, the defendant would have ceased to be a creditor of the bankrupt, the delay of the sheriff did not vary his rights. The 108th sect. of 6 Geo. 4, c. 16, cannot deprive any execution creditor of his remedy, unless he is a creditor having security at the time of the bankruptcy, and then seeking to avail himself of the execution to the prejudice of other creditors.

In re WASHBOURN, T. T. 1828. K. B. 8 B. & C. 444; S. C. 2 M. & R. 374.

A WRIT of execution against the goods of the defendants was placed in the hands of the sheriff of Gloucester, on the 24th January, 1828. The sheriff seized under this writ, and remained in possession. On the 5th February, a commission of bankruptcy issued against the defendants, under which they were duly declared bankrupts, and assignees were chosen. Afterwards, on the 27th February, and subsequent days, the sheriff sold the goods. The judgment in the cause had been obtained by nil dicit; whereupon, on the part of the assignees, a rule had been obtained, calling upon the plaintiffs and the sheriff to shew cause why the sheriff should not pay to the assignees the amount of the proceeds of the sale, the plaintiffs, under the 108th sect. of 6 Geo. 4, not being entitled to avail themselves of the execution against the other creditors.

And where not sold till after an act of bankruptcy was committed by the debtor, the Court refused a motion to compel the sheriff to pay over the proceeds of the sale to the assignees of the bankrupt.

Per Cur.—This rule seeks to introduce a new practice; and we think, under all the circumstances, the safer course is to discharge it. Questions may arise hereafter to affect the right of these assignees, which questions are not known to the parties at the present time. There may be, too, objections to the commission which are not known now, but may be discovered hereafter. The remedy by action is the proper one to be adopted by the assignees; and a jury are the proper tribunal to decide many of the questions, all of

* So, if goods were actually seized under an execution before the act of bankruptcy, though, on the same day, they may be sold at any time afterwards to satisfy the judgment; (*Stead v. Gascoigne*, M. T. 1818, C. P., 8 Taunt. 527); but, if seized after the act of bankruptcy, although sold before the issuing of the commission, (*Lazarus v. Waithman*, 5 Moore, 313), or if the execution be fraudulent or collusive; as, for instance, if, upon a writ of execution sued out before an act of bankruptcy committed, a warrant be made out, directed to the defendant's own shopmen, who take possession and conduct the business as usual, (but without the interference of the defendant), and on the day after the defendant commits an act of bankruptcy; (*Jackson v. Irwin*, 2 Camp. 43); or, if the warrant be made out to a sheriff's officer, but he be directed by the plaintiff not to sell, but merely to have a man in possession, and the defendant be allowed to carry on his trade in the town as usual, for some months, until he becomes bankrupt; (*Toussaint v. Hartop*, 1 Holt, 335); or the like: in these cases the goods seized will pass to the assignees under the assignment, notwithstanding the execution. So, if, after an act of bankruptcy, a creditor of the bankrupt attach money of his in the hands of a third party, the assignees may recover it from the creditor, as so much money had and received to their use. (*Sell v. Warwick*, 1 H. Bl. 665; *Phillips v. Hunter*, 2 H. Bl. 402; *Hunter v. Potts*, 4 T. R. 182).

which we might be concluding by interfering in this summary way upon motion. Rule discharged without costs.

GARLAND *v.* CARLISLE, M. T. 1833. C. P. 4 M. & Scott, 24; S. C. 2 C. & M. 31; S. C. 4 Tyr, 652.

But in subsequent cases it was held, that a seizure under an execution, after a secret act of bankruptcy,

IN an action of trover by the assignees of a bankrupt against the sheriff, it appeared that, after a secret act of bankruptcy, but without notice, the sheriff had seized and sold the bankrupt's goods under a *fi. fa.* Upon a special verdict, a writ of error was brought—

And the Court being equally divided in opinion, the judgment of the Common Pleas was affirmed; which decided that the sheriff was liable to the extent of the whole value of the goods seized.

YOUNG *v.* MARSHALL, M. T. 1831. C. P. 1 M. & Scott, 110; S. C. 8 Bing. 43.

after notice, was not protected,

THE sheriff had seized and sold goods of a bankrupt without notice, but had afterwards paid over the proceeds, upon an indemnity from the execution creditor.

The Court held, that the indemnity was virtually notice before the payment; and that the assignees were entitled to waive the tort, and recover in the action for money had and received.

CROSSFIELD *v.* STANLEY, E. T. 1832. K. B. 4 B. & Ad. 87; S. C. 1 N. & M. 668.

under 1 Will. 4, c. 7, and 6 Geo. 4, c. 16*.

IN assumpsit for money had and received, against the sheriff, to recover the proceeds of a sale under a *fi. fa.*, issued upon a judgment not protected by 1 Will. 4, c. 7, s. 7, notice of an act of bankruptcy committed before the sale, and of a docket struck thereon, having been given when the sale was nearly completed; after which the sheriff received the proceeds and handed them over to the execution creditor—

The Court held, that the 1 Will. 4, c. 7, s. 7, applies only to alter 6 Geo. 4, c. 16, s. 108, in cases of judgments on cognovits, &c., given after an action commenced adversely, and not by collusion; therefore, that a judgment signed on a warrant of attorney was within the latter provision, and the sheriff, having paid over the whole proceeds after notice of bankruptcy, was liable to the assignees for money had and received.

* But by the 1 Will. 4, c. 7, after reciting, that, "Whereas, by an act passed in the sixth year of the reign of his late Majesty King George the Fourth, intituled 'An Act to amend the Laws relating to Bankrupts,' it is provided, that no creditor, though for a valuable consideration, who shall sue out execution upon any judgment, obtained by default, confession, or nil dicit, shall avail himself of such execution, to the prejudice of other fair creditors, but shall be paid rateably with such creditors. And whereas, by reason of such provision, plaintiffs have been and may be deterred from accepting a cognovit actionem with stay of execution, whereby the expense of further proceedings in such action might have been and may be saved or diminished, for remedy thereof be it enacted, that no judgment signed, or execution issued after the passing of this act, or a cognovit actionem signed after declaration filed or delivered, or judgment by default, confession, or nil dicit, according to the practice of the Court, in any action commenced adversely, and not by collusion, for the purpose of fraudulent preference, shall be deemed or taken to be within the said provision of the said recited act."

PRICE *v.* HELYAR, E. T. 1828. C. P. 1 *M. & P.* 541; S. C. 4 *Bing.* 597.

THE sheriff, after an act of bankruptcy, seized and sold the bankrupt's property under an execution, and paid over the proceeds to the creditor without notice of the bankruptcy. In trover—

The Court held, that a sheriff is liable to the assignees of a bankrupt for goods taken in execution after acts of bankruptcy, although neither he nor his officers know or have notice of such, and although no commission taken out at the time of the execution, or payment of money to the plaintiff in the execution; supporting the cases of *Cooper v. Chitty*, 2 *Burr.* 20; *Price v. Helyar*, 4 *Bing.* 597.

And see *Smith v. Mills*, 1 *T. R.* 175; and *Lazarus v. Waithman*, 5 *Moore*, 313; 4 *M. & Selw.* 460.

And, in a prior case, it was so decided, even though without notice.

CUMMING *v.* WELSFORD, E. T. 1830. C. P. 6 *Bing.* 501; S. C. 4 *M. & P.* 238.

THE defendant obtained a judgment by nil dicit, (in an action for goods sold), against a bankrupt, and afterwards executed a writ of inquiry, and signed final judgment, which was affirmed on a writ of error, and issued execution against his effects before any act of bankruptcy committed; but an act of bankruptcy was committed before the sale. The final judgment was obtained before, but the execution issued after, the 6 *Geo.* 4, c. 16, came into operation.

The Court held, that this was a judgment within the provision in the 108th section of that statute; and, therefore, that the assignees were entitled to recover from the execution creditor the money levied.

With respect to executions upon judgments by nil dicit, the 6 *Geo.* 4, c. 16, is retrospective.

TAYLOR *v.* TAYLOR, E. T. 1826, K. B. 5 *B. & C.* 392; S. C. 8 *D. & R.* 159.

A DEBTOR, before bankruptcy, suffered judgment by default; and thereupon execution was issued and a levy was made. The debtor then became bankrupt. On motion to set aside the execution—

The Court held, that the 6 *Geo.* 4, c. 10, s. 108, does not avoid an execution levied by seizure, before bankruptcy, on a judgment by nil dicit, but only provides that the execution creditor shall share ratably with others. The Court, therefore, refused to set it aside.

The 6 *Geo.* 4, c. 16, s. 108, does not render an execution void, when levied before the bankruptcy, upon judgment by nil dicit; hence, the Court refused to set it aside.

WYMER *v.* KEMBLE, E. T. 1827. K. B. 6 *B. & C.* 479; S. C. 9 *D. & R.* 511.—S. P. NOTLEY *v.* BUCK, E. T. 1828. K. B. 8 *B. & C.* 160; S. C. 2 *M. & R.* 68.

A. HAVING a debt from B. secured to him by warrant of attorney, entered up judgment by non sum informatum, issued a fi. fa., and took from the sheriff a bill of sale of the goods seized; and B. having soon afterwards become bankrupt, his assignees took pos-

Under 49 *Geo.* 3, a creditor, who had obtained a judgment by nil dicit*, was not

* But see 1 *Will.* 4, c. 7, s. 7; and by 49 *Geo.* 3, c. 121; 46 *Geo.* 3, c. 135; and 6 *Geo.* 4, c. 16, s. 81, executions and attachments against property of bankrupts levied more than two months, without notice, &c., shall be valid, notwithstanding any prior act of bankruptcy. And where a commission has issued within two months, which is afterwards superseded, the two months shall be reckoned from the issuing of it. (See 2 & 3 *Vict.* c. 29, post, p. 89).

entitled to avail himself of his execution, as against the assignees, unless the bankrupt's goods had been sold under the execution, and the money paid over before the bankruptcy.

session of and sold the goods so transferred to A., who brought an action of trover for them.

The Court were of opinion, that the clause meant, that, if the execution creditor has received the money from his execution before the bankruptcy, he has no occasion to avail himself of the execution, according to the expression as used in the clause, because he makes no further claim; but if the goods have not been sold prior to the bankruptcy, they are then merely in the nature of a security for the debt, and the creditor cannot "avail himself" of it. The clause, in effect, therefore, says, "You shall not receive more than a ratable part of your debt, unless the execution had been levied by seizure of the property before the bankruptcy; and if your judgment has been obtained by *nil dicit*, confession, or default, you shall not avail yourself of the execution at all, unless the goods have been sold, and the money paid over to you before the bankruptcy." Judgment for the plaintiff.

GODSON *v.* SANCTUARY, M. T. 1832. K. B. 4 *B. & Adol.* 255; S. C. 1 *N. & M.* 52.

With respect to levy under an execution within two months, a fraction of a day was reckoned.

GOODS were seized under a *fi. fa.* at 11 o'clock of 13th August, and the commission issued against the debtors at a later hour on the 13th October, founded on an act of bankruptcy committed in June, and the goods were sold subsequently to the commission—

The Court held, 1st, that by seizure of the goods the execution was levied within the meaning of 6 Geo. 4, c. 16, s. 81; 2ndly, that, under the words of the act, the precise time of the execution must be ascertained; and lastly, that the general words of s. 108, did not divest the rights of the creditor under s. 81.

NOTLEY *v.* BUCK, E. T. 1828. K. B. 2 *M. & R.* 68; S. C. 8 *B. & C.* 160.

And it was the duty of the sheriff, having notice of the bankruptcy, to pay the amount to the assignees.

A. OBTAINS a judgment by confession or by *nil dicit* against B., and issues a *fi. fa.*, under which B.'s goods are seized; whilst the goods remain unsold in the sheriff's hands, B. commits an act of bankruptcy, on which a commission is issued. The sheriff, after notice of the commission, sells the goods and pays over the proceeds to A.

Per Cur.—The amount may be recovered from the sheriff by the assignees of B. as money had and received to their use. Whether the sale by the sheriff after such notice was wrongful, and would support an action of trover—*quære*.

A sheriff, who seized goods and executed a bill of sale to the judgment creditor, after notice that a docket was struck, was liable for the value of the goods to the assignees.

VAUGHAN *v.* WILKINS, T. T. 1830. K. B. 1 *B. & Ad.* 370.—S. P. DILLON *v.* LANGLEY, E. T. 1831. K. B. 2 *B. & Ad.* 131.

THIS was an action of trover against the sheriff, who, after notice of bankruptcy, seized and sold goods to the execution creditor, who afterwards sold them to V., who subsequently became an assignee.

The Court were of opinion, that, although the assignees might have treated the sale as invalid, and sued V. for the goods, yet that they might suffer V. to continue the possession and claim the value as against the sheriff.

2. *Executions on Judgments since 2 & 3 Vict., and of the filing Warrants of Attorney, &c., under 3 Geo. 4.*

EDWARDS *v.* LAWLEY, H. T. 1840. Ex. 6 M. & W. 285; S. C. 8 D. P. C. 234.—S. P. LUCKIN *v.* SIMPSON, T. T. 1840. C. P. 6 Bing. N. S. 353; S. C. 8 Scott, 676.

AN execution was bonâ fide levied after an act of bankruptcy committed before the passing of the 2 & 3 Vict. c. 29, and the fiat was dated and issued after the statute came into operation.

Per Cur.—As to the construction of the act, the terms of it are very general, and the words are to be taken in their ordinary grammatical sense. If we thought any injustice would arise, we should take care not to give a retrospective effect to this act; and certainly, if there had been a vested right at the time the act came into operation, it ought not to be defeated. It seems to us, however, that we shall do no injustice in applying the operation of the act to the date and issuing of the fiat, considering that previous executions are protected.

But see Moore *v.* Phillipps, 7 M. & W. 536; S. C. 9 D. P. C. 294.

NELSTROP *v.* SCARISBRICK, T. T. 1840. Ex. 6 M. & W. 684; S. C. 8 D. P. C. 746.

ON the 18th of July a fiat issued against Boddington, under which, on the 31st of July, the plaintiffs were appointed assignees. On the 19th of July, 1839, was passed the statute 2 & 3 Vict. c. 29.

Per Cur.—If the appointment of the assignees were to relate back to the date of the fiat great injustice would be done. In this case, the proceedings in bankruptcy were not completed until the assignees were appointed, and as they were not appointed till after the passing of the act, the right to the debtor's goods under the bankruptcy could not be said to be vested in any one at the time when the act passed.

The 2 & 3 Vict. c. 29*, is retrospective; as where the act of bankruptcy is committed before the passing of the statute and the fiat issued afterwards.

So, where the fiat issued before the passing of the act, and the assignees were appointed afterwards.

HURST *v.* JENNINGS, T. T. 1826. K. B. 5 B. & C. 650; S. C. 8 D. & R. 424.

THE bankrupt was the obligor in a bond for the payment of a sum of money on a certain day. On motion to set aside an execution made at the instance of the assignees of the bankrupt, it appeared, that the obligor, on the day of the date of the bond, execut-

But if an instrument be in effect a *cognovit actionem*, and not filed

* By c. 29, it is enacted, "That all contracts, dealings, and transactions, by and with any bankrupt, really and bonâ fide made and entered into before the date and issuing of the fiat against him, and all executions and attachments against the lands and tenements or goods and chattels of such bankrupt, bonâ fide executed or levied before the date and issuing of the fiat, shall be deemed to be valid, notwithstanding any prior act of bankruptcy by such bankrupt committed, provided the person or persons so dealing with such bankrupt, or at whose suit or on whose account such execution or attachment shall have issued, had not at the time of such contract, dealing, or transaction, or at the time of executing or levying such execution, notice of any prior act of bankruptcy by him committed; provided also, that nothing herein contained shall be deemed or taken to give validity to any payment made by any bankrupt, being a fraudulent preference of any creditor or creditors of such bankrupt, or to any execution founded on a judgment on a warrant of attorney or *cognovit*, given by any bankrupt by way of such fraudulent preference."

This statute does not protect executions on judgments or warrants, where the seizure was after a secret act of bankruptcy, but no sale, the 2 & 3 Vict. not repealing the 108th section of the 6 Geo. 4, c. 16. (*Whitmore v. Robertson*, M. T. 1841, Ex., MSS. See *Brook v. Mitchell*, 6 Bing. N. S. 349; S. C. 8 Scott, 739. *Hall v. Wallace*, 7 M. & W. 353).

within the twenty-one days, under 3 Geo. 4, c. 39,* the Court will set aside an execution issued thereon, at the instance of the assignees of the obligor.

ed an indenture, declaring the purposes for which the bond was executed, and by which it was agreed, that the plaintiffs, without notice, might enter up judgment and issue execution for the amount of any monies then due or thereafter to become due.

The Court held, that it was either a case directly within the 3 Geo. 4, c. 39, or a contrivance to evade its provisions; and the indenture not having been pleaded within 21 days after the execution, the rule for withdrawing the execution was made absolute.

AIRETON *v.* DAVIS, E. T. 1833. C. P. 3 *M. & Scott*, 138.

To render a warrant of attorney void under 3 Geo. 4, for want of filing, as regards bankruptcy, a valid commission must have been issued.

IN this case, a question arising as to the filing of a warrant of attorney in cases of bankruptcy—

The Court held, that the statute 3 Geo. 4, c. 39, requiring a warrant of attorney to be filed within twenty-one days after execution, otherwise to be void and fraudulent against assignees, is confined to the case of a valid commission; therefore, such warrant of attorney, though not filed under the statute, is good against a party acting as assignee under a commission illegally sued out.

BROOKE *v.* MITCHELL, H. T. 1840. C. P. 8 *Scott*, 739.

Whether an execution upon a warrant of attorney not filed within twenty-one days, under 3 Geo. 4, c. 39, is evidence of a fraudulent judgment, is undecided.†

UPON demurrer in this case, the question arose, whether a warrant of attorney upon which judgment was entered up, not having been filed within twenty-one days after its execution, and no judgment having been signed or execution issued within the same period, such warrant of attorney, and the judgment and execution thereon, were alike deemed fraudulent and void against the assignees under a commission, which issued more than twenty-one days next after the execution of such warrant of attorney, by virtue of the provisions of the 3 Geo. 4, c. 39. And whether the effect of that statute was altered by the provisions of the 2 & 3 Vict. c. 29, *quære*.

But the case being decided on another ground, the Court said it was unnecessary to give any opinion on the point.

* Cap. 39, s. 2, enacts, "That, if at any time after the expiration of twenty-one days next after the execution of such warrant of attorney a commission of bankrupt shall be issued against the person who shall have given such warrant of attorney, under which he shall be duly found and declared a bankrupt, then and in such case, unless such warrant of attorney, or a copy thereof, shall have been filed as aforesaid within the said space of twenty-one days from the execution thereof, or unless judgment shall have been signed or execution issued on such warrant of attorney, within the same period, such warrant of attorney, and the judgment and execution thereon, shall be deemed fraudulent and void against the assignees under such commission, and such assignees shall be entitled to recover back and receive, for the use of the creditors of such bankrupt at large, all and every the monies levied, or effects seized under and by virtue of such judgment and execution." And by Sect. 3, it is enacted, "That every cognovit actionem given by the defendant in any personal action, in case the action shall be in the same court of K. B., or a true copy of such cognovit actionem in case the action wherein the same is given shall be in any other court, shall, together with an affidavit of the time of the execution thereof, be filed with the said clerk, in like manner as such warrant of attorney and copies thereof and affidavits, within the space of twenty-one days after such cognovit actionem shall have been executed, otherwise such cognovit actionem and every judgment entered up thereon, and any execution taken out on such judgment, shall be deemed fraudulent and void against the assignees of the person giving such cognovit actionem under a commission of bankrupt issued against him after the expiration of the said twenty-one days, in like manner as warrants of attorney, and judgments and executions thereon are deemed and taken to be fraudulent and void under this act."

† *Quære*, whether the stat. 3 Geo. 4, c. 39, s. 2, applies to cases where there has been no act of bankruptcy at the time of giving the warrant of attorney. *Wilson v. Whitaker*, 1826, N. P., 1 *M. & M.* 8).

3. *Liability of the Sheriff under.*GILBERT *v.* WHALLEY, M. T. 1835. Ex. 2 C. M. & R. 722.

THE plaintiffs, having recovered a judgment against the two defendants, issued writs of execution against their goods, under which property of both the defendants was taken, and, as it was said, sold by the sheriff. It appeared, that the sheriff had not actually sold any of Matthew's goods, but had restored them to him. As to Thomas, it was alleged, that he had become a bankrupt, and a fiat issued; and though he disputed his bankruptcy, it was decided against him, and his assignees had arranged with the sheriff that the goods should be sold and disposed of in a particular manner.

The Court refused to allow the sheriff to be ruled to return the writ on his behalf.

After seizure the debtor became bankrupt; the assignees arranged with the sheriff, the Court refused to rule the sheriff to return the writ at the instance of the bankrupt.

COOK *v.* PALMER, E. T. 1827. K. B. 6 B. & C. 739; S. C. 9 D. & R. 723.

A SHERIFF had seized goods to a large amount, and beyond the quantity which would be necessary to satisfy the levy. The officer, while he remained in possession, allowed part of the goods to be sold, and received the money. The goods remaining unsold were still of a greater amount in value than the original amount of the levy. The execution creditor and the assignees of the debtor, (who in the interim had become a bankrupt), then entered into an agreement, that the goods should be sold to a person who was then willing to buy them at a sum mentioned in the agreement, and exceeding the amount of the levy. To this agreement the sheriff was no party, nor had he any knowledge of it. The goods were accordingly delivered to the buyer, who paid the agreed sum to the officer. The officer paid the execution creditor the amount of his levy, and afterwards failed. In an action against the sheriff at the suit of the assignees of the debtor for the excess—

So, where a sheriff's officer seized more than sufficient, before sale the trader became bankrupt, the assignees ordered the officer to sell and pay them over the surplus:—Held, that the assignees could not sue the sheriff for the surplus.

The Court held, that the sheriff was not liable: the sale for the excess being an act not within the officer's authority, and not recognised by the sheriff.

CARLISLE *v.* GARLAND, H. T. 1831. C. P. 5 M. & P. 102; S. C. 7 Bing. 298.

THE sheriff being in possession of goods of one L., under a writ of fi. fa., issued at the suit of one P., assented to an arrangement, whereby the goods were delivered over to P. in satisfaction of his debt; a portion of them being handed over to the officer to secure his poundage. Before the issuing of the fi. fa. L. had committed an act of bankruptcy, whereupon a commission was sued out after the delivery of the goods by the sheriff's officer.

The Court held, that such delivery amounted to a conversion, for which the sheriff was liable in trover at the suit of the assignees of L.

But where goods were seized under an execution, part were packed up to satisfy the levy, and another part to satisfy the poundage. The execution was afterwards abandoned:—Held, that trover lay against the sheriff.

ROWE *v.* AMES, T. T. 1840. Ex. 8 D. P. C. 750.

A DECLARATION in case against the sheriff, stated a delivery to him of a writ of fi. fa., issued upon a judgment recovered against one R. W., indorsed to levy, &c.; that he seized the goods of R. W. within his bailiwick, and remained in possession of them for a long

To an action against the sheriff for not selling under an execution, a

plea, that a fiat issued against the debtor, and that the property vested in official assignee, is bad*.

time, during which he might and ought to have sold, yet that he neglected the execution of his office, and forbore to sell, and afterwards falsely returned that the goods remained in his possession for want of buyers. Pleas: that R. W. became a bankrupt, and that within two months after the issuing of the writ in the declaration mentioned, and the delivery thereof to the defendant, and of the seizure of the goods, and before the passing of the 2 & 3 Vict., and before the defendant could or ought to have sold the said goods, a fiat issued, and the said R. W. was declared a bankrupt. That, before the commencement of the action, an official assignee was appointed, in whom the said goods so taken in execution became and were vested, concluding with a verification.

Per Cur.—The plea is bad.

5. *Of the Landlord's Right to Rent*†.

3rd.—*As to Extents at the Suit of the Crown.* See post, tit. *Extent*.

(d) IN RESPECT OF THE DISPOSITION OF PROPERTY WHERE THE ACT OF BANKRUPTCY INTERVENES BEFORE THE COMPLETION OF THE TRANSACTION‡. See, also, post, tit. *Stoppage in Transitu*.

* The 2 & 3 Vict. c. 29, protecting executions and contracts, cannot be shewn under the pleas of the general issue, and a denial of the possession of the goods, (*Maule, J., Byers v. Southwell*, M. T. 1839, N. P., 9 C. & P. 320), where the question is whether goods passed to the assignees or not? In an action against the sheriff for a false return, the petitioning creditor's debt need not be established or the depositions thereof produced. (*Erskine, J., Birt v. Stephenson*, 1839, N. P., 8 C. & P. 741). After notice of an act of bankruptcy, the sheriff sold under an execution. In an action by the assignees against the sheriff:—Held, that his officer who indemnified him was not a competent witness. (*Coltman, J., Groom v. Bradley*, E. T. 1838, N. P., 8 C. & P. 500).

† The tenant became bankrupt. After seizure under a *fi. fa.*, and the execution, being void, was abandoned, the landlord gave notice of his claim for a half year's rent:—Held, he was not entitled to the rent under the 8th Anne, c. 14, and 6 Geo. 4, c. 16: he should have distrained. (*Gethin v. Wilks*, T. T. 1833, B. C., 2 D. P. C. 189—*Taunton, J.*)

‡ In general, property transferred by a trader before his bankruptcy,—but an act remains to be done which is not completed until after his bankruptcy,—does not pass under the fiat. Hence, if money be advanced to a bankrupt before his bankruptcy, upon an agreement by the bankrupt to deliver property which is at sea, and indorse the bill of lading immediately upon its arrival, and the bill of lading be indorsed on its arrival, though after the bankruptcy, and the lender of the money obtain possession of the goods upon their arrival, he is entitled to retain them against the assignees. (*Lempriere v. Pasley*, 2 T. R. 485). So, where A. having consigned goods to B., the proceeds were remitted to him through C.; and A. wishing for such proceeds before they arrived, C. agreed to accept bills on their account; and A. having become bankrupt before the maturity of some of the bills:—the Court held, that C. was entitled to apply the proceeds of the consignments remitted to him after the bankruptcy in satisfaction of such his acceptances. (*Thomas v. Da Costa*, 2 Moore, 386; 8 Taunt. 345). But, if a trader, four days before he commits an act of bankruptcy, assign by bill of sale some shares of a ship at sea to a creditor, who does not comply with any of the requisites of the register acts till three weeks after such assignment, the shares so assigned are distributable under a commission issued against the trader. (*Moss v. Charnock*, 2 East, 399). So, if a trader, before he commits an act of bankruptcy, give instructions to an attorney to prepare a deed of assignment of a vessel at sea for the purpose of securing a creditor, and the assignment be not prepared till after the bankruptcy, such instructions are not sufficient to protect the property from being distributable under the commission. (2 T. R. 113).

(c) IN RESPECT TO THE DISPOSITION OF PROPERTY BY FRAUD.

1. *In Contemplation of Bankruptcy.*

GIBBINS *v.* PHILLIPPS, M. T. 1827. K. B. 7 B. & C. 529; S. C. 2 M. & R. 238.

ACTION of trover by the plaintiffs as assignees. One of the acts of bankruptcy relied on was the fact, that the bankrupt had given a bill of sale to his sisters of some furniture and effects which he had in a house in which they resided, and to which he occasionally resorted. The plaintiffs contended that this was fraudulent, that the money expressed in the bill of sale was not really due; and that it was given with intent to defeat or delay the creditors.

Mr. Justice *Littledale*, in addressing the jury, charged them thus:—With reference to each of the acts relied upon by the plaintiffs, did the bankrupt do this with bankruptcy in contemplation at the time? And the Court held that the direction was right.

In the case of a voluntary preference to a creditor for a *bonâ fide* debt, the question is, whether the debtor had bankruptcy in contemplation at the time.

SMITH *v.* SMITH, M. T. 1833. Ex. 2 Cr & M. 231; S. C. 4 Tyr. 52.

AFTER the plaintiff had *bonâ fide* taken, as a security from a trader for advances, an assignment of an equitable interest in stock, vested in the names of trustees under his marriage settlement, having heard rumours of insolvency, he mentioned, in a conversation with one of the trustees, that he was secured by such assignment:—

The Court held, that it amounted to sufficient notice to prevent the interest passing to the assignees, as being within the order and disposition of the bankrupt.

A mere conversation may be a sufficient notice to prevent an interest passing to the assignees, where the question turns upon an assignment in contemplation of bankruptcy.

BELCHER *v.* JONES, H. T. 1837. K. B. 2 M. & W. 258.

ONE of the partners in a bank, which was in a state of insolvency, intending to give a preference to his father-in-law, communicated to him the state of their affairs. The father-in-law, besides his private account, had also an account for an insurance company, of which he was a trustee. The bankrupt did not intend to favour the insurance company, and was anxious that no communication should be made to them; but his father-in-law transmitted the information to them, and their debt was drawn out by cheques, one paid over the counter, and the other passed through the clearing house, before the bank stopped. The other partners were not acquainted with the fact of the communication having been made. In an action for money had and received—

A communication by a trader, a banker, to a customer, who thereupon withdraws his account, is not a fraudulent preference.

Per Cur.—The act was done with the view of rendering a benefit to the bankrupt's father-in-law, and it was not the intention of the bankrupt, that his father-in-law should make use of the communication for the benefit of the Phoenix Company; indeed, the very contrary was his intention. The bankrupt has not given any money at all; the money was paid by his partners, and not in consequence of the communication made by the bankrupt. They paid the money on the company's draft, upon an application by their creditors, who had obtained a knowledge of their circumstances, contrary to the intention of the party who made the communication. This, therefore, was not a payment made voluntarily by the bankrupt; it is not a payment at all by the one partner who made the communica-

tion, but his copartners paid the order of their customer. It can only be considered as a fraudulent preference, when the object is, that one creditor, or a class of creditors, shall have some particular benefit.

2. After Bankruptcy.

M'SHANE *v.* GILL, H. T. 1824. N. P. 1 C. & P. 149.

An agreement between a bankrupt and a third party to obtain property from his assignees at a certain price, is void, as a fraud on the creditors.

ACTION for work and labour. The plaintiff, after his bankruptcy, had agreed that, if his house was sold by the assignees to the defendant at a given price, the defendant should pay him 30*l.* on the purchase-money.

Abbott, C. J., held the contract to be void in law. Even though the assignees had consented to it, it is a fraud on all the creditors except them. A communication of the agreement to all the creditors might make a difference, but a communication to the assignees alone will not do.

3. Voluntary Conveyance.

CANNAN *v.* DENEW, M. T. 1833. C. P. 10 *Bing.* 292; S. C. 3 *M. & Scott*, 761.

An assignment of furniture, &c., upon a condition that, if the money be not paid by a certain day, then a power of sale, the bankrupt to receive the profits in the meantime, is void, if a fiat issues within two months.

IN trover, by the assignees of a bankrupt, to recover the value of goods assigned, it appeared that the bankrupt, by bill of sale, which was dated the 5th September, 1832, assigned his furniture and other chattels to the defendant, upon trust to permit him, the trader, to possess and take the profits of the said chattels till the 25th March, 1833, and then to re-assign them to the trader, if the sum of 2700*l.*, and certain subsequent loans therein mentioned should be paid. But if such sums were not then paid, that it should be competent to the defendant to sell such goods and chattels, without the consent or concurrence of the trader, for the purpose of reimbursing himself. Upon the 31st October, 1832, a fiat issued against the trader. On the question, whether the assignment was protected by the 6 Geo. 4, c. 16—

Per Cur.—The assignment was not protected by the 81st section of 6 Geo. 4, c. 16*, as two calendar months had not elapsed between the conveyance, and the date and issuing of the commission; nor by the 82nd section, as the transaction was in the nature of a loan on a pledge, and could not be considered as the payment of an antecedent debt.

4. Provision for Wife†.

* But see 2 & 3 Vict. c. 29.

† If a trader agree, by writing before his marriage, to settle a specific amount of stock, he cannot increase the sum after marriage, so as to be valid for such increase against the creditors under a commission afterwards issued against him. (*Shaw v. Jakeman*, 4 East, 201; 1 Smith, 14). So is a voluntary conveyance of trader's property for the use of himself and his wife distributable under the commission. (*Styles*, 288). But if a settlement be made before marriage, though without a portion, it will be good against assignees, for marriage itself is consideration. (*Cooke*, B. L. 262. See 3 Meriv. 269; 1 Mont. B. L. 467). So, an equitable settlement by a trader, after marriage, upon his wife, of her property in possession of her trustees, and never in his own order, is valid. (1 Mont. B. L. 67).

5. *Provision for Children.*ABELL *v.* DANIELL, T. T. 1829. N. P. 1 M. & M. 370.

THE bankrupt was in the habit of advancing sums to his son, the defendant, for maintenance and discharge of his bills; and had given him a sum of money on the day when he stopped payment, knowing himself at the time insolvent, but not expecting to become bankrupt.

Tenterden, C. J., held, that the question was, whether it was paid in the ordinary course in which he maintained him; in which case the assignees could not recover it back; or whether it was for the purpose of securing him an advantage over, and to give him a benefit at, the expense of the creditors, when the plaintiffs would be entitled to a verdict. The jury found for the defendant.

Money given by a parent to his son in the ordinary course of maintenance, whilst insolvent, but not expecting to become bankrupt, cannot be recovered back by the assignees.

BELCHER *v.* PRITTIE, H. T. 1834. C. P. 10 *Bing.* 408; S. C. 4 M. & Scott, 295.

M., TRADING to a considerable extent, assigns, on the 1st July, 1831, at the request of his son, to whom he is *bonâ fide* a debtor, the lease of a valuable house to the trustees of his son's marriage settlement, as a security for his debt. He continues his business till January, 1832, and then becomes bankrupt. In *trover* for the lease, by his assignees against the trustees for the son, *Tindal*, C. J., left it, in his summing up, to the jury to say, whether the giving up the deed of the 1st July, 1831, to the trustees of the marriage settlement of M. was a voluntary act upon the part of the bankrupt, or whether it was given by him under the conviction and with the knowledge that the request of his son would be enforced by his trustees, who had undoubtedly the means of enforcing it. If the jury were of opinion that the assignment was voluntary, they should also consider whether M. did the act (the validity of which was disputed) with the idea and under the impression that his bankruptcy was inevitable. The jury found a verdict for the defendant. On motion to set it aside—

The Court held the summing up right, and that the assignment was not executed voluntarily, nor in contemplation of bankruptcy.

Whether a settlement by a trader on his child's marriage, six months before his bankruptcy, is valid, depends upon whether it was a fraudulent preference.

6. *By Partners.*BURT *v.* MOULT, E. T. 1833. Ex. 1 C. & M. 525; S. C. 3 *Tyr.* 564.

ONE of two partners, after committing an act of bankruptcy, handed over a bank post-bill to meet an acceptance of the partnership then becoming due, which was not known to or sanctioned by the other partner; and shortly after the other partner committed an act of bankruptcy. In *trover*—

The Court held, that one of two partners, after he has committed an act of bankruptcy, has no right, without the knowledge or consent of the other solvent partner, to appropriate the partnership property in discharge of a partnership debt.

A partner, after an act of bankruptcy, cannot pass partnership property as a preference.

(f) IN RESPECT TO THE DISPOSITION OF PROPERTY UNDER
LEGAL PROCEEDINGS.MORGAN v. BRUNDRETT, T. T. 1833. K. B. 5 B. & Ad. 289;
S. C. 2 N. & M. 280.

A deposit of property, under a threat of legal proceedings, is not a fraudulent preference.

THIS was an action of trover by the assignees of T. S., a bankrupt, to recover the value of a quantity of plate, deposited with the defendant by the bankrupt, after an act of bankruptcy and within two months before the issuing of the fiat. It appeared that a Chancery suit had been commenced against the bankrupt, to restore a sum of money which was in trust for another party; and that, after an act of bankruptcy and before commission issued, he, under threat of being taken under an attachment actually issued, deposited the plate in question with the defendant. It was contended, for the assignees, that this was a voluntary transfer, made in contemplation of bankruptcy, and, therefore, void as against the creditors, by the 6 Geo. 4, c. 16, s. 82; and, for the defendant, it was contended, that the deposit was not made in contemplation of bankruptcy; or, if it were so made, it would not on that account alone be void, as the pressure upon the bankrupt by the defendant made the act on the part of the former not a voluntary act.

Per Cur.—We think the modern decisions upon this subject have gone too far. They have been creeping on one after the other, so that if they be not checked, it will at last be held, that, if a trader be insolvent at a particular time, he must have contemplated bankruptcy. If the moving is by the creditor, we do not think the act in question can be called a voluntary preference by the bankrupt.

XII. OF PAYMENTS IN THE COURSE OF TRADE WHICH
ARE OR ARE NOT PROTECTED*.(a) WHAT SHALL BE A NOTICE OF BANKRUPTCY OR INSOLVENCY
TO AFFECT PAYMENTS MADE IN THE COURSE OF TRADE.TUCKER v. BARROW, M. T. 1827. N. P. 3 C. & P. 85; S. C.
1 M. & M. 137.

Knowledge of a party to be in difficulties

PER Lord *Tenterden*, C. J.—Under the 81st section of the Bankrupt Act, 6 Geo. 4, c. 16, a *bonâ fide* payment made by a bankrupt more than two months before the issuing of the commission, the re-

* By 21 Jac. 1, c. 15; 19 Geo. 2, c. 32; and by 6 Geo. 4, c. 16, all payments to the bankrupt, without knowledge of the bankruptcy, or *bonâ fide* by the bankrupt in the course of trade, or delivery of goods, shall be deemed valid. By the 46 Geo. 3, the issuing of a commission, or the striking of a docket, was notice of bankruptcy; but now, the only constructive notice of insolvency is the notification of the issuing of the commission in the Gazette. (6 Geo. 4, c. 16). See 2 & 3 Vict. c. 29.

A knowledge of insolvency may be inferred from the party buying of a trader to a great extent, for a period of nearly two years, at thirty per cent. under prime cost. (*Yates v. Carnesew*, M. T. 1828, 3 C. & P. 99). An account furnished by a bankrupt to a creditor, before his bankruptcy, shewing his debts and credits, is evidence to shew the bankrupt was cognizant of his own insolvency. (*Parke, B.*—*Scott v. Thomas*, 1834, N. P., 6 C. & P. 611). So, statements by a bankrupt, or letters connected with his affairs, about the time of a questioned payment, are admissible. (Lord *Tenterden*, C. J.—*Vacher v. Cocks*, E. T. 1829, N. P., M. & Malk. 353).

ceiver having no notice of an act of bankruptcy, is protected; and the fact of his knowing the bankrupt to be in difficulties makes no difference.

will not defeat a bonâ fide payment made by a bankrupt two months before the issuing of the commission.

(b) OF PAYMENTS WHICH ARE PROTECTED.

ATKINSON *v.* BRINDALL, M. T. 1835. C. P. 2 *Bing. N. S.* 225; S. C. 2 *Scott*, 369, *questioning* MORGAN *v.* BRUNDRETT, T. T. 1833. K. B. 5 *B. & Ad.* 296; S. C. 2 *N. & M.* 280.

IN an action by the assignees of a bankrupt it appeared that a fiat had issued against the bankrupt in February, 1834, but, in consequence of an arrangement by which the creditors were to receive 15s. in the pound, no further proceedings were taken, and the fiat fell to the ground; subsequently to this period, the debt contracted by the bankrupt to the defendant, in money lent, amounted to more than 200*l.*, and on the 13th January the bankrupt's bills were dishonoured. He wrote letters praying for forbearance and an extension of time; but, on the 15th January, two days after the dishonour of the bills, without any application on the part of the defendant, the bankrupt sent him the money sought to be recovered. A second fiat was issued against the bankrupt on the 28th January, under which the plaintiffs were appointed assignees. In the summing up, the Judge told the jury, that the question for their consideration was, whether at the time of the payment the party contemplated bankruptcy; and that the fact of his insolvency, or of his contemplating insolvency, would not entitle the plaintiffs to a verdict. A verdict having passed for the defendants, on motion for a new trial—

Payments made, unless in the contemplation of bankruptcy, are protected; mere insolvency does not invalidate them*.

The Court refused to interfere, being of opinion that the summing up was correct.

FLOOR *v.* JONES, M. T. 1826. C. P. 12 *Moore*, 96; S. C. 4 *Bing.* 20.

SEPTEMBER 24, 1824, D., the obligor, who on the 14th August preceding had quitted premises he held of the obligee, paid the obligee the balance on a bond due October 19th following; the fixtures left on the premises, which were valued on the 24th September, being taken in discharge of the other portion of the sum payable under the bond. In July preceding, D., upon looking into his affairs, found he could pay only 17s. in the pound, and he sold his watch and part of his stock to satisfy some claims upon him. D. became bankrupt October 28th, 1824, but said he had no intention of becoming bankrupt at the time he paid the obligee, though he made the payment because he expected other creditors would get possession of his property. In an action by D.'s assignees against the obligee—

Whether a particular payment has been made by a trader in contemplation of bankruptcy, is purely a question for the jury;

The Court held, that the jury were properly directed to consider whether the payments were made by D. with a view to the probability of his becoming bankrupt, and in fraudulent preference of the obligee.

* And where a father was in the habit of supplying the son with money to pay his bills, and on the day, though just before he stopped payment, he gave him 200*l.*, it was held to be given in the ordinary course of maintaining the son, and, therefore, not a fraudulent preference. (*Abell v. Daniell*, T. T. 1829, M. P., M. & M. 370).

COOK *v.* ROGERS, M. T. 1831. C. P. 7 *Bing.* 438; S. C. 5 *M. & P.* 353.

who must consider the motives and intention of the bankrupt.

ACTION to recover back money paid, as alleged, under a fraudulent preference, the bankrupt stated that he paid it after a threat of arrest, partly with a view of relieving his father from all liability.

The Court held, that, upon the question of voluntary payment, the Judge properly left to the consideration of the jury the motives and intention of the bankrupt, as being material, under the circumstances, to the consideration whether the payment was in fact made in consequence of the threats.

See Cowp. 117; 7 *East*, 544; 11 *Id.* 256; 1 *Campb.* 446.

TERRINGTON *v.* HARGREAVES, H. T. 1829. C. P. 5 *Bing.* 489; S. C. 3 *M. & P.* 137.

Payments made before the passing of 6 Geo. 4, c. 16, are protected; the clause is retrospective.

PULLEN became bankrupt on the 26th June, 1822. It appeared that Pullen was insolvent in the month of February, 1822, and remained so insolvent until the issuing of the commission of bankruptcy. The defendants, on the 4th August, 1822, received from Pullen the sum of 165*l.* 7*s.* 6*d.*, being the first instalment of a debt due to them, for which they, with other creditors, had on the 21st March preceding agreed to take Pullen's notes, payable at four, eight, twelve, and sixteen months, and that, at the time when they so received the said sum of 165*l.* 7*s.* 6*d.*, they knew that Pullen was insolvent, but did not know that he had committed an act of bankruptcy.

Per Cur.—It has been admitted, that unless there are words in an act of parliament indisputably shewing that it is to be construed retrospectively, it ought to be held to be prospective only. This proposition we fully accede to; but we think there are words here to shew that section 82nd is retrospective; no sense can be made of it without putting this construction upon it. The words of the 6 Geo. 4 are, "That all payments really and bonâ fide made, or which hereafter shall be made by a bankrupt, or by any person on his behalf, before the date and issuing of the commission against such bankrupt, to any creditor of such bankrupt, (such payment not being a fraudulent preference of such creditor), shall be deemed valid, notwithstanding any prior act of bankruptcy by such bankrupt committed; and such creditor shall not be liable to refund the same to the assignees of such bankrupt, provided the person so dealing with the bankrupt had not, at the time of such payment by or to such bankrupt, notice of any act of bankruptcy by such bankrupt committed." The words "payments really and bonâ fide made," must be held to relate to payments made at and before the time of the passing of this act, otherwise they will be insensible.

CHURCHILL *v.* CREASE, M. T. 1828. C. P. 5 *Bing.* 177—S. C. 2 *M. & P.* 415.

A bonâ fide payment, eight days before the commission issued, is protected.

A TRADER, in prison, under arrest for debt, eight days before the issuing out of the commission under which he was declared a bankrupt, obtained a day rule and went to an insurance office to receive a sum of money that was due to him. The defendant, a creditor, knowing that his debtor was to receive the money, met him at the office, and there demanded and received payment of his debt. In an action by the assignees to recover the sum so paid to the defendant, as money had and received to their use, the jury having found

that the payment was not made with a view to a fraudulent preference, and that the creditor was not, at the time, aware of an act of bankruptcy by the debtor—

The Court held the payment to be protected by section 82 of the 6 Geo. 4, c. 16.

BENNETT v. SPACKMAN, E. T. 1824. N. P. 1 C. & P. 274.

ASSUMPSIT to recover money expended by the bankrupt for the defendant, in the erection of several houses. The act of bankruptcy was committed on the 27th February, 1823. To cut down the demand, several bills of exchange* were given in evidence, and among them, a bill dated December 11th, 1822, at four months from the date, was offered. It was objected, that, as this bill became due on the 14th April, 1823, which was after the act of bankruptcy, it could not be admitted.

And a payment by a bill is protected in the same manner as in money*.

Best, C. J.—It is receivable in evidence, because it is a good payment, unless it was made with a knowledge of the insolvency of the bankrupt; and it will be for the jury to say whether it was so made or not.

REYNOLDS v. WEDD, T. T. 1838. C. P. 6 D. P. C. 728; 4 Bing. N. S. 694; S. C. 6 Scott, 699.

A TRADER, after committing an act of bankruptcy, was arrested, under process from a Court of competent jurisdiction, by a creditor, and deposited a sum in Court, under the 2nd section of the 7 & 8 Geo. 4, c. 71, but failed in complying with a requisite of the statute, inasmuch as he did not lodge the sum required for costs; and the creditor, upon an order duly obtained, took out the money before the commission issued:—

Money deposited in lieu of bail, and taken out by the plaintiff by order of the Court, is protected.†

Held, that such deposit of the money in Court by the trader amounted to a payment, under compulsion of legal process; and, consequently, that the assignees were not entitled to recover back the money from the creditor.

VACHER v. COCKS, E. T. 1830. K. B. 1 B. & Ad. 145.

THE bankrupt, an army agent, upon opening a new account with the defendants, his bankers, in order to cover advances, had agreed that they should receive all the funds coming to him from government; and they accordingly received considerable sums after the act of bankruptcy, to recover which the assignees having brought an action—

So is a payment, made in pursuance of a previous contract.

The Court held, that a payment, made in pursuance of a previous contract, cannot be deemed the result of a preference.

BEDFORD v. PERKINS, M. T. 1828. N. P. 3 C. & P. 90; S. C. 3 M. & M. 353.

A., BEING a trader, before any act of bankruptcy, directed his

And an order

* In the absence of any evidence of fraud, the delivering to a party a bill dishonoured by him, for goods subsequently purchased under an agreement for ready money, may be equivalent to payment, and, on the bankruptcy of the vendor, cannot be impeached by his assignee. (*Mayer v. Nias*, 1 Bing. 311; S. C. 8 B. Mo. 275).

† But if paid in after an act of bankruptcy, and a commission issue within two months, the payment is not protected. (*Littledale, J.*—*Ferrall v. Alexander*, M. T. 1831, B. C., 1 D. P. C. 132).

given, before bankruptcy, by a trader to a third party, to pay money for him, and which the third party agrees to do, will protect the latter in making the payment.

broker, who had authority to distrain for rents due to him, to pay a certain sum to B., in satisfaction of a debt; and the broker *bonâ fide* agreed with B. to pay him as soon as he received the rents; and, after this, A. became bankrupt.

Tenterden, C. J., held, that the assignees of A. could not recover this sum from the broker, though he did not, in fact, pay it over to B. till after the commission issued.

SHAW *v.* BATLEY, H. T. 1833. K. B. 4 *B. & Ad.* 801; S. C. 1 *N. & M.* 751.

So, a payment made by an agent, though his principal had committed an act of bankruptcy;

THE defendant having guaranteed the amount of timber sold, and had it assigned as a security, but the purchaser being obliged to pay a certain amount on a certain day, delivered part in cash and the residue in bills to the defendant, for the purpose of his paying the amount to the purchaser—

The Court held, that, notwithstanding he procured the bills to be discounted at his bankers, and made the payment by his own cheque on them, it must be intended that he acted only as the agent of the purchaser, in so converting the bills into cash, and that the payment was protected under the 6 Geo. 4, c. 16, s. 82, the purchaser having previously committed an act of bankruptcy.

WOODBIDGE *v.* SWANN, E. T. 1833. K. B. 4 *B. & Ad.* 633; S. C. 1 *N. & M.* 724.

or a payment made by a solvent partner, *bonâ fide*, and without knowledge of his co-partner's act of bankruptcy, is good.

P. AND E. were in partnership, and kept an account with the defendants, bankers; and after the bankruptcy of Ellis, Parker continued to carry on the joint trade, thinking it was solvent and capable of paying its debts. He paid into the bank of the defendants 900*l.*, part of the partnership funds, to be applied by the defendants in payment of running bills of Parker and Ellis, which were payable at the defendants' bank; the 900*l.* was applied accordingly. In an action by the assignees against the defendants, for money had and received, P. having also become bankrupt—

The Court held, that if one of two partners becomes bankrupt, his solvent copartner, who still continues to carry on the joint trade, may apply the joint fund to the discharge of partnership debts. Therefore, that the assignees of the bankrupt could not recover from the bankers the sums so paid in an action for money had and received.

ABBOTT *v.* POMFRET, H. T. 1835. C. P. 1 *Bing. N. S.* 462; S. C. 1 *Scott*, 470.

And money, *bonâ fide* paid by a bankrupt for the benefit of a third party, cannot be recovered back by the assignees.

THE defendants, bankers, discounted a bill for a person engaged in trade, the payment of which was secured by the written guarantie of a third person. The trader, a few days before the bill was drawn, being on the eve of bankruptcy, gave the party who was surety a cheque upon the defendants for the amount of the bills, and they, having money of the bankrupt's in their hands to that amount, gave up the bill; immediately afterwards, the trader became bankrupt. In an action by his assignees against the defendants, to recover the amount, on the ground of the payment being a fraudulent preference—

The Court held, that the assignees could not recover from the

defendants the amount so paid in, on the ground of fraudulent preference, which, if any, was intended not to the defendants, but to the third person by whom the security was given, and against whom there was a remedy over.

CROWFOOT *v.* LONDON DOCK COMPANY, T. T. 1834. Ex. 2 C. & M. 637; S. C. 4 Tyrw. 967.

THE bankrupt entered into a contract to execute certain works for the defendants, whose engineer was to reject any materials and to provide others, and to provide competent persons to execute the works if the contractor should fail to do so, and to deduct the amount paid from the sums payable under the contract; and also to add to or diminish the works, paying or deducting according to the contract prices. The defendants made great advances, and the bankrupt agreed that the engines, materials, &c., brought on the premises, should be a security for such advances. The contractor becoming bankrupt, and some of the materials having been brought on the premises after the bankruptcy, in trover—

Where a builder becomes bankrupt during the progress of the work, payments made will be considered as general advances, and cannot be applied to the materials on the premises.

The Court held, that the plaintiffs were entitled to recover for such materials as were brought on the premises after the bankruptcy, although payments were subsequently made to the bankrupt exceeding the value thereof; as such payments could only be considered as general advances, and not as payments for those particular goods in the course of business, within the protection of section 82 of 6 Geo. 4, c. 16.

(c) PAYMENTS WHICH ARE NOT PROTECTED.

DEVAS *v.* VENABLES, E. T. 1836. C. P. 3 Bing. N. S. 400; S. C. 4 Scott, 123.

IN this case, the circumstances under which the defendant bought goods of the bankrupt, just before the bankruptcy, shewed that he knew, or had the means of knowing of the embarrassed state of the bankrupt's affairs, and that the transaction was not honest.

Payment, with knowledge of the bankrupt's circumstances,

Per Cur.—The payment is not protected; the terms “really and bona fide paid,” mean something different from and additional to an actual payment.

GIBSON *v.* BOUTTS, E. T. 1835. C. P. 3 Scott, 229.

IN an action by the assignees of a bankrupt, for money had and received, it appeared that the bankrupt, being much embarrassed, and finding he must stop payment, applied the monies he had, voluntarily, to repay sums borrowed by him of his friends; and this action was brought to recover back one of those sums. The money had been paid on the 3rd September, and one fiat issued on the 5th, which was not proceeded with; but another was issued on the 11th October. *Tindal, C. J.*, told the jury, that if the bankrupt, at the time of making the payment, thought his creditors would accept a composition, and did not contemplate bankruptcy, then the payment was protected. The jury found for the defendant.

or a voluntary payment, with knowledge of contemplated bankruptcy, is not protected; but it is a question for the jury;

But, on payment of costs, the Court granted a new trial, because it was purely a question for the jury.

BISHOP *v.* CRAWSHAY, M. T. 1824. K. B. 3 *B. & C.* 415; S. C. 5 *D. & R.* 279.

Nor is a payment for goods, by accepting bills before the delivery of the goods.

TROVER, for goods, by the bankrupt's assignees. It appeared that the defendants, on the 26th January, 1822, sent an order to the bankrupt for the goods in question, which were of the value of 167*l.*; that the bankrupt, on the 6th February, committed an act of bankruptcy; that, on the 6th February, the bankrupt drew a bill for 400*l.* on the defendants, which they, on the faith that their order would be executed, and not knowing of the act of bankruptcy, accepted, as they had been accustomed to accept bills, before they had received the goods; that the bankrupt, on the 8th February, put the goods on board barges in the canal, which were delivered to the defendants on the 25th February, 1822; and that the commission of bankruptcy issued on the 15th February, 1822.

Per Cur.—By the statute of James, it is enacted, that no debtor of the bankrupt shall be thereby endangered for the payment of his debt, truly and bonâ fide, to any such bankrupt, before such time as he shall understand or know that he has become bankrupt. In order, therefore, to bring this case within the statute, it must appear that the defendants were debtors of the bankrupt. Now, there was no debt created until the goods were actually delivered; and, consequently, at the time the bill was accepted, the relations of debtor and creditor, as to these goods, did not exist between the parties.

See *Cash v. Young*, 2 *B. & C.* 413.

SAUNDERSON *v.* GREGG, 1820. N. P. 3 *Stark.* 72.

The act of bankruptcy was by lying in prison:—

A payment the day the bankrupt goes to prison, the imprisonment being the act of bankruptcy, is regulated by the relation of the act of bankruptcy.*

Held, that the whole day of the arrest might be taken into the account in calculating the two months; but that it was competent to the other party, for the purpose of shewing a right of property, to prove the very hour of the day when the goods were delivered by the bankrupt previous to his imprisonment on that day:—Held, also, that the 1 Jac. 1, c. 15, s. 14, protected only payments, and not sales.

SPRATT *v.* HOBHOUSE, E. T. 1827. C. P. 4 *Bing.* 173; S. C. 12 *Moore*, 395.

The amount of a check, obtained and paid after knowledge of insolvency, may be recovered back†.

L. was possessed of a lease of a public-house, which was deposited with the defendants as security for 1275*l.*, due from L. to them. T., having a sum of 650*l.* in the hands of the defendants, agreed with L. to purchase his lease for 1690*l.*; but he not having sufficient to complete the purchase, the defendants consented to advance the sum required, retaining the lease as security. L., T., and

* If A. deliver a bill of exchange to a person, not knowing that he is a bankrupt, who returns it again to A., his assignees cannot recover the amount of it as money paid by the bankrupt after he became a bankrupt. (*Moore v. Barthrop*, 1 *B. & C.* 5; S. C. 2 *D. & R.* 25).

† So, money sent to an accommodation acceptor by the drawer, after he stopped payment, but before he became bankrupt, may be recovered by the assignees. (*Guthrie v. Crossley*, T. T. 1826, N. P., 2 *C. & P.* 301). See *Poland v. Glyn*, 2 *D. & R.* 310, where it was held, that, in the bankrupt laws, it is a general rule, that if a person pay a sum of money, knowing that he must become bankrupt, unless under the influence of a threat, it is a voluntary payment, although the payee receive it in the ordinary course of business, without any knowledge that he is being preferred to the other creditors. Therefore, where a person,

one D., a clerk of the defendants, met to effect the transfer, when T. drew a draft on the defendants, in favour of L., for 1690*l.*, which was handed over to D., who, on L.'s executing the transfer to T., gave him a draft on the defendants for 414*l.*, the difference between the amount of their debt and that of the purchase-money. L. had committed an act of bankruptcy, and the defendants received notice from a creditor not to pay the draft, as a docket would be struck against him. The defendants refused to pay the draft when presented, but they afterwards paid it under an indemnity.

The Court held, that the assignees of L. might recover the amount against the defendants in an action for money had and received; and that the defendants had sufficient notice of L.'s bankruptcy.

See 5 B. & A. 228; 13 East, 20.

BAGNALL v. ANDREWS, M. T. 1830. C. P. 4 M. & P. 839; S. C. 7 Bing. 217.

THE bankrupt had a current account with the defendants for goods sent to them for sale. The bill in question was accepted by the defendants on the general account. It did not appear that either party was aware of the state of the account at the time the acceptance was given; but it afterwards turned out that the balance was in favour of the defendants. Before the bill arrived at maturity, the bankrupt was in insolvent circumstances, and had absconded from his general creditors. He was in London for nearly three weeks, unknown to them, passing under two fictitious names, frequently changing his place of abode, and expecting to be arrested and to have a docket struck against him. Whilst in this state, and concealing himself from his creditors, he was dining with one of the plaintiffs, to whom he owed a large sum; the plaintiff asked him for money, and he delivered him the bill in question, which was all he had at the time. A commission was afterwards issued against Woodbridge upon an act of bankruptcy previously committed by him.

A payment by bill of exchange, after an act of bankruptcy, to a creditor who knew that the bankrupt had secreted himself to avoid creditors, is not protected.

Per Cur.—The jury found a verdict for the defendants, at the same time expressly stating, that the bill had been indorsed after an act of bankruptcy by the drawer, of which the plaintiffs had no notice. Yet, as the jury still found their verdict for the defendants, it could only have proceeded on the ground, that the delivery of the bill to the plaintiffs by the bankrupt, either was not a bonâ fide payment to them, or was a fraudulent preference of the plaintiffs; in either of which cases, the payment is not protected by the statute.

BIGGS v. FELLOWS, T. T. 1828. K. B. 8 B. & C. 402.

ONE of two partners, being about to dissolve partnership, received a warrant of attorney to himself alone, from a debtor, to secure the payment of a debt to the partnership by instalments; and he, after the debtor had committed an act of bankruptcy, and after the dissolution of partnership, received part of such debt, but died before the commission was sued out.

Where a warrant of attorney is given to A. for a partnership debt due to A. and B., and A. dies, after receiving instalments after the

The Court held, that the surviving partner, in the absence of any being deeply indebted, paid his bankers, who had merely written to him for a small sum of money, it was held, that such a demand was not a threat; and that, inasmuch as it could, from the circumstances, be predicated that a bankruptcy would follow, the assignees had a right to the money back again.

bankruptcy of the debtor, an action lies against B. for the money so received*.

evidence of his being exonerated by the terms of the dissolution, was liable to repay to the assignees of the debtor the money so received after his bankruptcy. —

CRAVEN v. EDMONSON, T. T. 1830. C. P. 6 *Bing.* 734; S. C. 4 *M. & P.* 622.

A payment by the bankrupt partner, of a partnership debt, is not protected by the 82nd section of 6 Geo. 4, c. 16.

AFTER an act of bankruptcy by one of two partners, he paid a partnership debt to a creditor, who had knowledge of the act of bankruptcy.

The Court held, that such payment was not protected by the 82nd section of the 6 Geo. 4, c. 16, as he had himself ceased to have any interest in the partnership funds, and his authority to make any payment for his partner was dissolved. The bankruptcy in one partner destroys the agency that before subsisted; not, perhaps, as to all purposes, as in the case of *Lacy v. Wooleot*, (2 D. & R. 458), where a bill of exchange, accepted for a firm by one of the partners, after he had committed an act of bankruptcy, was held to be an available instrument in the hands of an innocent indorsee. Here, however, the receiver had knowledge of the act of bankruptcy at the time of payment.

XIII. OF PAYMENTS UNDER LEGAL PROCESS.

BELCHER v. MILLS, E. T. 1835. Ex. 2 *C. M. & R.* 150.

Money paid under process of law is protected.

IN an action by the assignees of a bankrupt, for money had and received, it appeared a defendant, on arrest, gave a bail-bond, and did not afterwards perfect his bail, so that the sheriff was fixed. He paid to his attornies a sum of money towards the payment of the debt and costs, and four days after became a bankrupt. His attornies took out a summons before a judge, to stay proceedings against the sheriff, on payment of the debt and costs; and the application being stated to be on behalf of the bail, an order was made; upon which the money was paid over.

The Court held, that this was to be considered as a payment under legal process; and, therefore, the assignees had no right to it from the party who had received it.

HIGGINS v. M'ADAM, H. T. 1829. Ex. 3 *F. & J.* 1.

Although the act of bankruptcy be committed before the return of the writ,

IN this case, it was decided that an execution creditor, upon a judgment by confession, upon the sale of the goods seized under that execution, ceased to be "a creditor having security," within the 108th section, although the act of bankruptcy became complete before the return of the writ. By sale, the property is changed; and it is immaterial that the money is not paid over.

TEALE v. YOUNGE, T. T. 1825. Ex. 1 *M'Clel. & F.* 497.

as under an arrest.

ACTION by assignees to recover money paid by a bankrupt, after an act of bankruptcy, to creditors, for goods bonâ fide sold in the ordinary course of trade, was referred from *Nisi Prius* to an arbitrator, who found specially, a payment under arrest, and several

* Goods supplied, to be paid for weekly, are not payments protected by the 19 Geo. 2. (*Bolton v. Jager*, 1825, N. P., 1 R. & M. 265).

other circumstances, strongly tending to shew knowledge in the creditors that the bankrupt was in insolvent circumstances, and awarded a verdict for the plaintiffs for the sum paid and costs, without stating on what ground he proceeded.

The Court held, first, that he must have concluded the defendants had notice of the insolvency, and that the award was sustainable on that ground; secondly, that the words “insolvent circumstances,” in the 19 Geo. 2, c. 32, s. 1, are to be understood in the popular sense, and do not mean a state of utter and complete insolvency; thirdly, (although this did not enter into the reason of the determination), that, on the authority of former decisions, of which they disapproved, a payment under arrest was protected by the statute in question, as a payment in the ordinary course of trade. *Hullock*, B., assenting on the first ground of the decision, but questioned the last point.

See 3 B. & P. 237; 7 East, 154; 11 Id. 127.

XIV. OF PAYMENTS BY DELIVERY OF* OR ADVANCE UPON GOODS.

CANNON v. WOOD, E. T. 1837. Ex. 2 M. & W. 465.

THE bankrupt having contracted a debt to the defendant, the latter made repeated applications for payment, and finally, on the 11th and 12th June, 1835, received from him two several parcels of goods, which were taken at a low price, in diminution of the debt; and, a few days afterwards, a cognovit was given for the residue. The bankrupt had previously committed a secret act of bankruptcy; and, on the 29th June, a fiat issued against him.

Per Cur.—The sole question is, whether a payment in goods is a payment within the 82nd section. It is quite clear, that payment may be made in any way the parties may choose; and it seems equally clear, that these goods were delivered and received as payment.

Delivery of goods in payment of a debt, upon urgent request, though after a secret act of bankruptcy, is protected†.

WRIGHT v. FEARNLEY, M. T. 1838. C. P. 5 Bing. N. S. 89; S. C. 6 Scott, 813; S. C. 7 D. P. C. 129; S. C. M. T. 1840. 6 Bing. N. S. 446.

THE declaration consisted of two counts, the first laying the property of the goods in question in the bankrupt before the bankruptcy; the second laying it in the plaintiffs, as assignees after that event. Plea, that A. G. Ross became a bankrupt; and before the date and issuing of the fiat against the said Ross, to wit, on the 26th March, 1837, he, the said A. G. Ross, delivered to and deposited with the defendant, the said goods and chattels in the said second count mentioned, in consideration of and upon certain large advances of money, amounting to a large sum of money, to wit, 2000*l.*, then made and advanced by the defendant to the said A. G.

But money advanced upon a deposit of goods, is not a payment within 6 Geo. 4, so as to be protected, though *bonâ fide*.

* See ante, 6 Geo. 4, c. 16, s. 82.

† A debtor may confer a preference on a creditor if he be not a trader; but if he be a trader, he can only do so to avoid legal proceedings. And where such a preference may be conferred, it may be done by parol, provided possession be accompanied with the transfer. (*Parke*, B.—*Scott v. Thomas*, 1834, N. P., 6 C. & P. 611).

Ross, at his request, upon the delivery and deposit of the said goods and chattels in the said second count mentioned, with the defendant, to secure payment to the defendant of such advances thereon. On demurrer—

The Court held, that a deposit of goods by a trader as a security for the loan of money, after an act of bankruptcy and within two calendar months of the date and issuing of the commission against him, is not protected by the 81st section of the Bankrupt Act, 6 Geo. 4, c. 16, being a transaction within the time prescribed by that section. Neither is it protected by the 82nd section, though the advance is made *bonâ fide* before the date and issuing of the commission, and without any knowledge, on the part of the lender, of a prior act of bankruptcy; inasmuch as the protection given by this section is confined to the payment of that which is properly a debt, and to transactions in which the parties stand in the relation of debtor and creditor to each other; and such is not the case upon the advance of money upon deposit.

GREEN *v.* WHITE, T. T. 1836. C. P. 3 *B. N. S.* 59; S. C. 3 *Scott*, 387.

So, goods placed in the hands of a party for a subsequent advance, are not protected, though the advance be made.

A. AND B., traders, having stopped payment on the 23rd of November, gave, upon the 27th of that month, an order to W., an acceptor for their accommodation of two bills not then due, upon the defendants, for a certain sum to meet the acceptances, the money to be advanced upon certain silks of the traders then in the possession of the defendants. The order was duly attended to; and, according to an agreement between W. and the defendants, the money was to remain in the hands of the latter, until the acceptances, to meet which it was given, became due, and a cheque was then given *pro formâ*. The order, though originally given by the traders to W. on the 27th, was dated the 13th of November, and was entered in the trader's books as of such date. The fiat was issued against the bankrupts on the 5th of December, and the payments were made by the defendants to W. on the 6th and 14th, to meet the bills which then fell due respectively. In an action by the assignees against the defendants for money paid for their use, the jury found, that the order was given to W. by way of fraudulent preference, and in contemplation of bankruptcy.

The Court held, that the assignees were entitled to recover, as the payments, having been made after the fiat, were made after notice of bankruptcy, and were not within the protection of sect. 82 of the Bankrupt Act.

XV. OF PROPERTY POSSESSED BY THE BANKRUPT AS REPUTED OWNER*.

(a) CASES WITHIN THE STATUTES 21 JAC. AND 6 GEO. 4.

SHAW *v.* HARVEY, H. T. 1834. K. B. 1 *A. & E.* 920.—S. P. CARRUTHERS *v.* PAYNE, M. T. 1828. C. P. 5 *Bing.* 270; S. C. 2 *M. & P.* 420.

Property in the possession of the bankrupt,

UPON reference of an action of trover by assignees, the arbitrator found, that the bankrupt, a timber merchant, had before his bank-

* By 21 Jac. 1, c. 19, and 6 Geo. 4, c. 16, s. 72, all goods in the possession of

ruptcy, on behalf of the defendant, an unnamed principal, taken by way of exchange a quantity of timber, to be delivered free aboard, and had at the same time bought other timber on his own account; that the timber lay on a common, mixed with other timber in the bankrupt's possession, until after the bankruptcy; and that the defendant, more than two months before the bankruptcy, wrote to the vendor, disclosing himself as the principal, and that the bankrupt should not be suffered to take them, and the vendor accepted him as the purchaser; that the defendant had demanded the timber of the bankrupt, who had proposed to make up a deficiency in the quantity out of his own timber, but nothing further passed until two months of the bankruptcy, when the bankrupt made a formal delivery to the defendant of part of the exchanged and part of the sold timber; and he found that the whole continued in the bankrupt's order and disposition, with the consent of the true owner, until after the bankruptcy.

The Court held, that the property remained in the bankrupt's apparent possession, with the true owner's consent, up to the time of such formal delivery; and lastly, that such delivery was not referable to any contract which would give the defendant the benefit of the protection of sect. 81 of 6 Geo. 4, c. 16, or prevent the operation of sect. 71, by which the property passed to the assignees.

ARBOUIN *v.* WILLIAMS, 1824. N. P. 1 R. & M. 72.

THE bankrupt deposited with the defendants, bankers, sealed packets, with blank delivery orders, as a security for advances, which, upon knowledge of his insolvency, and before any act of bankruptcy, they opened, and filling up the orders in their own names, obtained the goods. at the time of the bankruptcy,

In trover by the assignees, Lord *Gifford* held, that, as the goods had been transferred before the date of the act of bankruptcy, if no fraud shewn, the bankrupt could not be said to have them within his order and disposition within the statute; that, as to those transferred on that day, if there were any standing in his name on that day, whether transferred before or after the act, they would be

the bankrupt as reputed owner, pass to his assignees, except assignments of ships when duly registered. Statements made by a bankrupt before his bankruptcy are evidence on the question of reputed ownership. (*Sharp v. Newholme*, T. T. 1839, C. P., 8 Scott, 21; *Abr. post*).

* To entitle the assignees of a bankrupt under the 72nd sect. of the 6 Geo. 4, c. 16, it must appear, that the goods, &c., were in the order and disposition of the bankrupt *directly* with the consent of the true owner; a mere permission by the true owner to deal with them as such will not do. (*Farquhar v. Swansea Canal Company*, E. T. 1834, K. B., 3 N. & M. 391; S. C., 1 A. & E. 354; *Abr. post*, tit. *Canal*).

A covenant, that A. shall have the use of furniture, unless he become bankrupt, upon which event B. shall resume possession of it. If some of the creditors know of the fact, and others do not, it is for the jury to say whether A. was the reputed owner. The mere covenant itself does not divest the assignees of A. of the right to the furniture. (*Abbott, C. J.*—*Hickenbotham v. Groves*, M. T., 1826, N. P., 2 C. & P. 492). An hotel keeper hired furniture and became bankrupt; the assignees seized the furniture. In an action by the lender of the furniture against the assignees, the question for the jury is, whether it be so much the custom to hire the furniture, that persons could not be misled by supposing it to be the bankrupt's. (*Gurney, B.*—*Mullett v. Green*, H. T. 1838, N. P., 8 C. & P. 382).

within the statute; and, as to those standing in the name of the bankrupt's agent, which had never been in his, the Judge left it to the jury to say, if they could be said to be in the reputed ownership of the bankrupt, and if he had any reputation from them.

LYON *v.* WELDON, M. T. 1824. C. P. 2 Bing. 334; S. C. 9 Moore, 629.

not afterwards,
passes to the
assignees.

A BROKER, who, under a distress, afterwards appraised and valued the goods distrained, in conjunction with another broker, and the plaintiff purchased under such valuation.

The Court held, that although the distress was irregular, and contrary to the stat. 2 Will. & Mary, yet, that it would not prevent the plaintiff from acquiring a good title to the property so valued and sold to him; and where the tenant had previously to the distress committed an act of bankruptcy:—Held, that plaintiff might maintain trespass against his assignees for seizing the goods so purchased by him, as they did not come into the possession of the plaintiff with the consent of the true owner, until after the latter had become bankrupt; the words, “at the time he shall become bankrupt” in the stat. 21 James 1, c. 19, s. 11, referring to the act of bankruptcy, and not to the time when a party shall be duly declared a bankrupt.

FOSTER *v.* FRAMPTON, M. T. 1826. K. B. 6 B. & C. 107; S. C. 9 D. & R. 108.

The delivery of
part of a con-
signment will
generally in-
vest the con-
signee with the
right of property
in the whole,
so as to give the
assignees the
right to claim
such goods as
being in the
order and dis-
position of the
bankrupt.

THE bankrupt had been a grocer and tea-dealer at Birmingham. The defendants were wholesale grocers in London. They had dealings together. In August, 1825, the defendants, in pursuance of the bankrupt's order, sent a quantity of grocery goods, addressed to “Mr. Michael Fowler, Birmingham.” They were delivered to Corbet, the Birmingham carrier. The bankrupt was in the habit of keeping his heavy and large goods at Corbet's wharf, at Birmingham, and taking them away as he wanted them. The goods in question arrived in due course at Corbet's wharf; and Corbet's man, Bagshaw, gave notice thereof to the bankrupt. The bankrupt desired that they should continue at the wharf, and said he would go and sample them, and would let them know when he would take them away. A part of the goods were accordingly taken away and put on one side in the bankrupt's shop, and samples thereof were shown to customers. There was a running quarterly account between the bankrupt, and Corbet, the carrier; but, from the course of dealing between them, the bankrupt might have had the goods away without paying for their carriage. This was on or about the 5th of September. On the 4th of October, the bankrupt committed an act of bankruptcy: the remainder of the goods in question being at Corbet's wharf, under the circumstances before stated. On the 12th of October, the defendants gave notice to Corbet not to part with the remainder of the goods to the bankrupt, or to any one on his account; and, subsequently, Corbet, on being indemnified by the defendants, redelivered the goods to them.

Upon these facts, the Lord Chief Justice was of opinion, that the transitus was at an end when the goods arrived at Corbet's wharf, at Birmingham, for the bankrupt. But, independent of this, he

thought the taking of the samples by the bankrupt amounted, in point of law, to a delivery of the whole to him; and that this fact alone placed the case out of doubt.

On motion for a new trial a rule was refused.

CARVALHO *v.* BURN, H. T. 1832. K. B. 4 *B. & Ad.* 383; S. C. 1 *N. & M.* 700. Judgment affirmed, 1 *A. & E.* 883,

A TRADER in England was in the habit of consigning goods to his agent in America for sale, on the faith of which consignments he drew bills on the agent. They were negotiated through a mercantile house in London; and, on the non-acceptance by the agent of some of the bills, the mercantile house requested the trader to order his agent, if he did not pay the bills, to deliver to the correspondent of the mercantile house such property as he had of the trader's, and such order was accordingly given; but, before it arrived at America, the trader committed an act of bankruptcy; on which, after the arrival of the letter in America, a fiat issued, after which the goods were delivered to the correspondent.

But the Court were of opinion that they passed to the assignees.

So, goods in possession of bankrupt, intended to be assigned, but not actually transferred, pass to assignee.

BUTLER *v.* HOBSON, H. T. 1838. C. P. 4 *Bing. N. S.* 290; S. C. 6 *D. P. C.* 409; S. C. 5 *Scott*, 798.

J. BAKEWELL and his father were formerly in partnership, and they were declared bankrupt on the 4th of April, 1815; a dividend was declared, and the parties obtained their certificates. J. Bakewell then carried on another business upon his own account, different from that in which he had been unfortunate, and at different places; first, at Stockwell, and then at Manchester. In this trade he continued until the 19th of April, 1828, when he was again declared bankrupt, and the plaintiff, his brother-in-law, with another person, deceased, was chosen assignee. Under this commission, a dividend was declared; the creditors were paid 1s. 7d. in the pound, and the certificate was duly obtained; and he still, with the consent of the assignees, continued in possession of the stock. He again engaged extensively in business, and was again declared bankrupt upon the 8th of November, 1836; and it was for the defendant's wrongful conduct, as assignee under this commission, that the action was brought: the defendant having seized the goods, &c., on the bankrupt's subsequent insolvency. It also appeared, that the goods were in the bankrupt's possession with the consent of the first assignee, the plaintiff. In trover, by the plaintiff, as such assignee—

And the bankrupt's possession by the consent of his assignees, does not interfere with their right to seize, on subsequent insolvency.

The Court held, that the plaintiff was entitled to have the goods.

(b) CASES NOT WITHIN THE STATUTES 21 JAC. AND 6 GEO. 4.

WOOD *v.* WOOD, M. T. 1823. N. P. 1 *C. & P.* 59.

TROVER for cloth. It was contended, that the goods had not passed to the assignees under the statute of Jac., as the possession of the bankrupt was only consistent with a usage in the cloth trade relative to the return of cloths sent for inspection. Witnesses spoke,

To prevent goods sent to a bankrupt from passing to assignees, it must

be proved that there is a general notorious custom that the goods should be so sent*.

some of three days being the time allowed for inspection, some a week, others a month.

Burroughs, J., held, the custom not sufficiently confirmed or notorious; and that it did not prevent the operation of the statute passing the property to the assignees.

WATSON *v.* PEACHE, M. T. 1834. C. P. 1 *Bing. N. S.* 327; S. C. 1 *Scott*, 149.

Hence, barges hired by a coal merchant, which, according to the custom of the trade, are registered and marked with his name, do not pass to the assignees.

TROVER by the assignees of a bankrupt to recover the value of certain barges found in the possession of the bankrupt, at the time of his bankruptcy, marked with and registered in his name, and of which he was said to be the reputed owner, under the 72nd sect. of the 6 Geo. 4, c. 16.

The defence relied on by the defendants was a custom in the trade to let out barges on hire; and that he, being a barge owner and barge builder, let out barges and craft on permanent hire to a great many persons carrying on the trade of coal merchants, lightermen, &c., and amongst others to the bankrupt; that the barges in question were lent on hire to the bankrupt, and remained the defendant's property; and, therefore, that the custom took the case out of the statute.

The Court held, that the proof of a custom in a trade to let out barges permanently, and have them marked, "J. C.," in the name of the hirer, was sufficient to take the case out of the statute, and rebut the *prima facie* evidence of ownership derived from the possession. The proper question for the jury, as to such a custom, is, not whether it was notorious to all the world, but whether it was known to those conversant with the trade, and likely to have dealings with the bankrupt.

SMITH *v.* TOPPING, M. T. 1833. K. B. 5 *B. & Ad.* 674; S. C. 2 *N. & M.* 421.

Where, previous to an act of bankruptcy, the owner of goods demanded them, but the trader, being absent, they were refused:—Held, that they did not pass to the assignees.

IN TROVER, it appeared, that, previous to an act of bankruptcy, a demand was made by an authorized agent, for the delivery up of goods of the plaintiff, which were in the bankrupt's possession, which was refused. The bankrupt being absent at the time, it appeared also, that the demand had been made by a clerk who transacted the plaintiff's business. He opened his letters and answered them, and had the plaintiff's authority so to do; he did not sell goods, or draw or indorse bills of exchange for him, nor was he empowered to do so. He saw the plaintiff the following week after the demand of the wine, and told him of it. The plaintiff approved of his having done so.

The Court held—1st, that such goods were not in the possession, order, and disposition of the bankrupt, with the consent of the true owner, and that the plaintiff might bring trover against the assignees. And 2nd, that the clerk was a competent person to make the demand.

BARTRAM *v.* PAYNE, M. T. 1827. N. P. 3 *C. & P.* 175.

So, a chattel, finished and

TROVER for a carriage which had been built by the bankrupt for the plaintiff, and paid for by him; but, as the plaintiff was

* Of which custom all persons dealing with him must be presumed cognizant. (*Mullett v. Green*, 1838, N. P., 8 C. & P. 382).

going abroad, he suffered the carriage to remain on his premises. The assignees seized the carriage, and claimed it as the bankrupt's property. But

Per Gaselee, J.—The 71st sect. of 6 Geo. 4, c. 16, does not make this carriage in the order and disposition of the bankrupt. It is not necessary there should be an actual delivery at the house of the purchaser to constitute him the owner.

paid for by a purchaser, but left by him in the possession of the manufacturer, does not pass.

GREENING v. CLARK, T. T. 1825. K. B. 4 B. & C. 316;
6 D. & R. 375.

THE plaintiff purchased goods in the East India Company's warehouses, received the invoices and paid the price, but the vendor retained the warrants in his possession, which he subsequently pledged to the defendant, and afterwards became bankrupt.

The Court held, that, as the vendor had not the goods in his possession at the time of his bankruptcy, and could not have obtained them without repaying the defendant, they were not within "his possession, order, and disposition," within the statute, and the plaintiff therefore was entitled to recover.

And the bonâ fide pledge of East India Company warrants by a bankrupt prevents the goods to which they relate passing, not being in the order and disposition of the bankrupt.

XVI. OF THE OFFICIAL ASSIGNEE.

(a) APPOINTMENT OF, AND DUTY AND AUTHORITY OF.

BY 1 & 2 Will. 4, c. 56, s. 22, it is enacted, "That a number of persons, not exceeding thirty, being merchants, brokers, or accountants, or persons who are or have been engaged in trade in the cities of London or Westminster, or the parts adjacent, shall be chosen by the Lord Chancellor to act as official assignees in all bankruptcies prosecuted in the said court of bankruptcy; one of which said official assignees shall in all cases be an assignee of each bankrupt's estate and effects, together with the assignee or assignees to be chosen by the creditors; such official assignee to give such security, to be subject to such rules, to be selected for such estate, and to act in such manner as the said chief and other Judges, with the consent of the Lord Chancellor, shall from time to time direct; and all the personal estate and effects, and the rents and profits of the real estate, and the proceeds of sale of all the estate and effects, real and personal, of the bankrupt, shall in every case be possessed and received by such official assignee alone, save where it shall be otherwise directed by the said court of bankruptcy, or any Judge or commissioner thereof; and all stock in the public funds, or of any public company, and all monies, exchequer bills, India bonds, or other public securities, and all bills, notes, and other negotiable instruments, shall be forthwith transferred, delivered, and paid by such official assignee into the Bank of England, to the credit of the accountant-general of the High Court of Chancery, to be subject to such order, rule, and regulation, for the keeping of the account of the said monies and other effects, and for the payment and delivery in, investment, and payment and delivery out of the same, as the Lord Chancellor, or the said Court of Review, or any Judge of the said Court of Bankruptcy, if authorized so to do by any general order of the same court, shall direct; and if any such assignee shall

The official assignees are appointed by the Lord Chancellor, and it is their duty to act with the other assignees, and they are to take superintendence of the bankrupt's estate, and receive all monies, &c.

neglect to make such transfer, delivery, or payment, every such assignee shall be liable to be charged in the same manner as by the said recited act is provided in cases of neglect by assignees to invest money in the purchase of exchequer bills, when directed so to do: provided always, that until assignees shall be chosen by the creditors of each bankrupt, such official assignee so to be appointed to act with the assignees to be chosen by the creditors shall be enabled to act, and shall be deemed to be, to all intents and purposes whatsoever, a sole assignee of each bankrupt's estates and effects."

But they have no right to interfere with the solicitor, or sale of the property.

By 1 & 2 Will. 4, c. 56, s. 23, it is enacted, "That nothing herein contained shall extend to authorize any such official assignee to interfere with the assignees chosen by the creditors in the appointment or removal of a solicitor or attorney, or in directing the time and manner of effecting any sale of the bankrupt's estates or effects."

Upon the death or removal of an official assignee, the Chancellor may appoint another.

By sect. 23, it is enacted, "That it shall be lawful for the Lord Chancellor, from time to time, as any vacancy may occur in the said before-mentioned number of official assignees, to appoint some other such person as aforesaid to fill any vacancy so occurring; and in case of the death or removal of any official assignee who shall have been appointed to act in any bankruptcy, it shall be lawful for the said court of bankruptcy, subject to any rules to be made by virtue of this act, to appoint another official assignee, of the number hereby prescribed, to act in the same bankruptcy in the place of the assignee who shall have so become dead or been removed."

(b) POWER TO ACT WITH OTHER ASSIGNEES.

The official assignee's power to act with the other assignees is derived from the commissioner.

By 1 & 2 Will. 4, c. 56, s. 40, it is enacted, "That it shall be lawful for each commissioner of the said Court, who shall thenceforth act in such commission, at his discretion, to appoint some one of the aforesaid official assignees to act with the existing assignees, if any, under such commissions, and to direct the existing assignees to pay and deliver over to such official assignees all monies, books, papers, and effects whatsoever in their possession or custody as such assignees; and all the real and personal estate of the bankrupt, under such commission, shall, immediately on such appointment, vest in such official assignee jointly with the existing assignees, if any, in like manner as if the proceedings in the said bankruptcy had originally been commenced by virtue of this act, without prejudice to any action or suit commenced, or any contract entered into by the existing assignees at the time of the passing of this act."

(c) LIABILITIES OF.

MUNK v. CLARKE, M. T. 1835. C. P. 2 *Bing. N. S.* 299; S. C. 2 *Scott*, 743; S. C. 3 *M. & Scott*, 463; S. C. 10 *Bing.* 102.

A bankrupt, who disputes the validity of the commission, which is set aside, may sue the official

IN an action for money had and received against the defendant as official assignee, it appeared, that a commission of bankruptcy issued against the plaintiff, on the petition of J. F., under which commission the plaintiff was declared a bankrupt by the commissioners named in the commission, and that J. F. was chosen sole assignee under the commission. The estate and effects of the plaintiff were

assigned to J. F. by the said commissioners; but, at the time of issuing the commission, the plaintiff was not indebted to J. F. in the sum of £100. After the issuing of the commission, the plaintiff disputed the validity thereof, on the ground of the alleged insufficiency of the petitioning creditor's debt. The plaintiff applied to one of the commissioners of the Court of Bankruptcy, to appoint an official assignee to the said commission, as well for the purpose of investigating the petitioning creditor's debt, as for the purpose of taking care of the property of the estate. And the said commissioners, on such application of the plaintiff, appointed the defendant as official assignee of the estate and effects of the plaintiff, under the commission, for the purposes aforesaid; but the defendant never received any notice that the plaintiff disputed the commission, or that he, the defendant, was appointed for any special purpose. The defendant received from a tenant of certain premises belonging to the plaintiff the sum of money in question, and retained the same in his own hands at the commencement of this action.

The Court held, first, that the action for money had and received may be maintained by a supposed bankrupt against the official assignee, without a previous demand, if it is found that no petitioning creditor's debt existed; and, secondly, that the fact of the supposed bankrupt's applying to a commissioner to appoint an official assignee for the purpose of protecting the property, is not a proof of the supposed bankrupt's acquiescence in the commission, nor will it estop him from suing such assignee.

assignee for money received by him, though the bankrupt expressed a wish he should be appointed.

(d) ACTIONS AGAINST.

KNIGHT v. TURQUAND, M. T. 1836. Ex. 2 M. & W. 101.

THIS was an action of trespass, brought against the defendant, an official assignee, under a fiat of bankruptcy issued against the plaintiff to try the validity of that fiat. It was proved, that the property of the plaintiff had been taken and sold more than three months before the commencement of the action. It was objected, on the part of the defendant, that the action was too late, according to the 6 Geo. 4, c. 16, s. 44.

Per Cur.—The official assignee is in the same situation as the provisional assignee was formerly. The act of parliament has vested all the bankrupt's property in him; but, if he do interfere, he does so by virtue of that assignment, and of the right of property thereby given to him. The only difference is, that the commissioner must select him out of a certain number of persons appointed by the Lord Chancellor, whereas they might have selected any one to be the provisional assignee. The effect of the statute is, to give him the same power as the provisional assignee, previous to the choice of the general assignees; he is not, therefore, within the protection afforded by the 6 Geo. 4, limiting the period for the commencement of the action to three months, where he seizes goods the property of the bankrupt, who disputes the bankruptcy, nor is he entitled to notice of action.

The 6 Geo. 4, does not protect the official assignee so as to entitle him to notice of action, or limit the time for bringing the action.

XVII. OF THE ASSIGNEES*.

(a) OF THE CHOICE OF.

1. *Time of Election*†.
2. *Who eligible to be elected*‡.
3. *How many may be elected*§.
4. *Who may vote, and manner of voting at the Election*||.
5. *Evidence of Appointment*¶.
6. *Enrolment of the Appointment***.

* Until assignees are chosen, the official assignee is, to all intents and purposes, sole assignee. (1 & 2 Will. 4, c. 56, s. 22). If no person will become assignee, not even the petitioning creditor, the commission will be superseded. (1 Christian, B. L. 252).

† By 6 Geo. 4, c. 16, s. 6, it was enacted, "That, at the second meeting appointed by the commissioners, or any adjournment thereof, assignees of the estate and effects shall be chosen."

But, by the 1 & 2 Will. 4, c. 56, s. 20, it is enacted, "That it shall be lawful for any commissioner, who shall make any adjudication of bankruptcy, to appoint two or more public meetings, instead of the three meetings directed by the recited act, for the bankrupt to surrender and conform, the last of which said meetings shall be on the forty-second day after the publication of his bankruptcy in the Gazette; and the choice of assignees shall take place at the first of such two meetings."

‡ The assignees should be persons of integrity and of sufficient opulence to be responsible for the sums which they may receive from the bankrupt's estate. (1 Atk. 87, 90, 91). There is no necessity for the assignee being a creditor; (*Ex parte Ridout*, cited 1 Mont. 283); but a bankrupt cannot be chosen assignee of his own estate. (1 Coop. 286; Green. 260).

§ The 5 Geo. 2, c. 30, s. 26, used the words "assignee or assignees," the 6 Geo. 4, c. 16, s. 61, says "assignees." It would, therefore, seem, that there is no restriction as to the number, provided, under the latter act, more than one be chosen; two are the usual number.

|| By the 5 Geo. 2, c. 30, s. 26, and 6 Geo. 4, c. 16, s. 61, it is enacted, "That all creditors, who have proved debts under the commission to the amount of £10 and upwards, shall be entitled to vote in such choice, and also any person authorized by letter of attorney from any such creditor or creditors, upon proof of the execution thereof, either by affidavit sworn before a Master in Chancery, Ordinary or Extraordinary, or by oath before the commissioners *vivâ voce*, and in case of creditors residing out of England, by oath before a magistrate, where the party shall be residing, duly attested by a notary public, British minister, or consul, (in 6 Geo. 4 only), and the choice shall be made by the major part in value of the creditors entitled to vote: Provided, that the commissioners shall have power to reject any person so chosen, who shall appear to them unfit to be such assignee as aforesaid, and upon such rejection a new choice of another assignee or assignees shall be made as aforesaid," (in 6 Geo. 4 only). Sect. 62 enacts, "That, in all commissions against one or more of the partners of a firm, any creditor, to whom the bankrupt or bankrupts is or are indebted, jointly with the other partner or partners of the said firm, or any of them, shall be entitled to prove his debt under such commission, for the purpose only of voting in the choice of assignees under such commission, and of assenting to, or dissenting from, the certificate of such bankrupt or bankrupts, or either of such purposes." (See 3 Geo. 4, c. 31, s. 10).

¶ By 1 & 2 Will. 4, c. 56, s. 29, it is enacted, "That a certificate of the appointment of such assignees, purporting to be under the seal of the said Court of Bankruptcy, shall be received as evidence of such appointment in all Courts and places whatsoever without further proof."

** The appointment is by certificate. And to pass the real estate in a term of years, it seems, that the certificate of the appointment of assignees must be re-

(b) DUTIES OF*.

STAINES v. WAINRIGHT, M. T. 1839. C. P. 6 *Bing. N. S.* 174; S. C. 8 *Scott*, 280.

IN this case it appeared, there was an agreement by assignees with a creditor, in consideration of his payment of a sum of 10s. in the pound to all the creditors who had then proved, that he should receive the entire amount of his debt to a certain extent, and the whole of the remainder of his debt when ascertained, in preference to all other creditors, except two, who were to prove and receive dividends as if no such agreement had been made.

The Court held, that the agreement was void, as an administration of the bankrupt's estate at variance with the bankrupt law.

The assignees must administer the effects according to the bankrupt laws.

(c) RIGHTS OF.

1. *In general.*

HANCOCK v. CAFFYN, E. T. 1832. C. P. 8 *Bing.* 358; S. C. 1 *M. & Scott*, 521.

DEFENDANT, a lessee for a term, underlet to B., and put him in possession, under an agreement to grant a lease when B. should have paid £1200, which he was to do by instalments in three years, in the mean time paying rent at certain days to defendant, subject to distress for non-payment. Defendant received rent from B., but omitted to pay the superior landlord, who distrained on B. for

Assignees of bankrupt tenant may sue landlord on an implied contract for breach of quiet enjoyment†.

gistered in any county in England, or place abroad, where registry is necessary. (*Anon.*, 1 *Dea. & Chit.* 349; 6 *Geo. 4*, c. 16, s. 64; *Elliott v. Danby*, 12 *Mod.* 3; 7 *Vin.* 125). It seems, that the counterpart cannot be enrolled on an affidavit that the original is lost. And, by 1 & 2 *Will. 4*, c. 56, s. 27, it is enacted, "That where, according to any laws now in force, any conveyance or assignment of any real or personal property of a bankrupt would require to be registered, enrolled, or recorded in any registry office in England, Wales, or Ireland, or in any registry office, court, or other place in Scotland, or any of the dominions, plantations, or colonies belonging to his Majesty, then, in every such case, such certificate as hereafter is described of the appointment of an assignee or assignees shall be registered in the registry office, court, or place, wherein such conveyance or assignment as last aforesaid would require to be registered, enrolled, or recorded, and the registry hereby directed shall have the like effect, to all intents and purposes, as the registry, enrolment, or recording of such conveyance or assignment as last aforesaid would have had; and the title of any purchaser of any such property as last aforesaid, for valuable consideration, without notice of the bankruptcy, who shall have duly registered, enrolled, or recorded his purchase-deed, previous to the registry hereby directed, shall not be invalidated by reason of such appointment of an assignee or assignees as aforesaid, or the vesting of such property in him or them consequent thereupon, unless the certificate of such appointment shall be registered as aforesaid within the times following, (that is to say), as regards the United Kingdom of Great Britain and Ireland, within two months from the date of such appointment, and, as regards all other places, within twelve months from the date thereof.

* Since the 1 & 2 *Will. 4*, c. 56, the assignees' duty is very limited. But they still have full power over the solicitor, and directing the time and manner of effecting any sale of the bankrupt's estate or effects. Their other duties are vested in the official assignees. (See ante, Div. XVI.).

† Assignees, who repay money advanced by a creditor to discharge an execution against the bankrupt, cannot sue the sheriff for the money paid to the creditor. (*Bucker v. Booth*, T. T. 1830, N. P., 1 *M. & M.* 518).

arrears due from the defendant. B. having become bankrupt:—Held, that the damage incurred by this distress was a cause of action on which his assignees might sue.

See Lynch v. Burnet, 2 D. & R. 368.

PORTER v. VORLEY, T. T. 1832. C. P. 9 Bing. 93; S. C. 2 M. & Scott, 141.

So, assignees may sue for damages, when the bankrupt's estate has been made liable for the defendant's default*.

A. HAVING hired a carriage of B., let it to C.; C. injured it by improper use while in his possession, and, on its return to A., he sent it to B. damaged, who repaired it, with the assent of A. A. became bankrupt, and B. proved the amount due for repairs under his commission:—Held, that A.'s assignees had a right of action against the defendant for breach of his implied contract to use the phaeton properly; but A.'s estate not having paid, nor being able to pay, any dividend, that they could recover nominal damages only for the breach of contract, the estate of the bankrupt not having been damaged.

See Weight v. Fairfield, 2 B. & Ad. 727.

BRADBURY v. ANDERTON, M. T. 1834. Ex. 1 C., M. & R. 486; S. C. 5 Tyr. 152.

But assignees cannot revoke a contract as to part, and affirm as to part.

THE defendant received goods from the bankrupt after a secret act of bankruptcy, the price of which was to be paid to a creditor of the bankrupt, who had pressed for his account; the price had not been paid, but the defendant, being a creditor of such third party, had received credit in his account.

In an action of assumpsit by the assignees for the price of the goods, the Court held, that the jury should have found whether this was part of the contract of sale, or merely a direction as to the application of the payment, countermandable by the seller at any time; because, if it were a part of the contract of sale, the assignees, by bringing this action, had confirmed the contract, and were bound by the whole, they could not affirm it in part; if it were not, then the defendant could only defend himself by a bonâ fide payment, within the 6 Geo. 4, c. 16, s. 82, which this seemed not to be; and granted a new trial to have this fact determined.

* But assignees, by using premises for the benefit of the estate, cannot afterwards reject the lease under which they were held of the bankrupt. (*Clark v. Hume, H. T. 1825, N. P., 1 R. & M. 207*). By the 49 Geo. 3, c. 121, s. 19, it is enacted, "That any bankrupt entitled to any lease, or agreement for a lease, if the assignees accept the same, shall be liable to pay any rent accruing after the date of the commission, or be sued in respect of any subsequent non-observance or non-performance of the conditions, covenants, or agreements therein contained." This clause is repeated in the 6 Geo. 4, c. 16, s. 75, with the addition, that, "if the assignees decline the same, the bankrupt shall not be liable in case he deliver up such lease or agreement to the lessor, or such person agreeing to grant a lease, within fourteen days after he shall have had notice that the assignees shall have declined as aforesaid, and if the assignees shall not (upon being thereto required) elect whether they will accept or decline such lease or agreement for a lease, the lessor or person so agreeing as aforesaid, or any person entitled under such lessor or person so agreeing, shall be entitled to apply by petition to the Lord Chancellor, who may order them so to elect, and to deliver up such lease or agreement in case they shall decline the same and the possession of the premises, or make such other order therein as he shall think fit."

WARD v. SHEW, H. T. 1833. C. P. 2 M. & Scott, 756; S. C. 9 Bing. 608.

THE assignees of a bankrupt, in consequence of an arrangement entered into between the bankrupt and his creditors, gave to the bankrupt an authority, in writing, to receive the rents and arrears of rents due on certain premises, the property of the bankrupt previous to his bankruptcy, in the following terms:—

A mere authority by assignees to the bankrupt, authorizing him "to receive rents, and that his receipt should be a discharge," does not enable him to distrain.

"W. S. having completed an arrangement with Messrs. H. & A., his assignees, for the five houses, &c., the premises in question, on the 21st day of May inst., and for the arrears of rent due thereon, the tenants in the respective premises are hereby authorized to pay their respective rents to the said J. S., whose receipt shall be their discharge.

"Signed by the Solicitors to the Assignees."

"May 24th, 1831."

Per Cur.—Such an authority does not contain a power to distrain, and an action can be maintained against the party who levies a distress under such supposed power.

BERNASCONI v. FAIRBROTHER, T. T. 1827. K. B. 7 B. & C. 379.

THE assignees of the bankrupt, in their own name, and not in their character of assignees, brought trespass against the sheriff and execution creditor for seizing goods, which consisted of the stock on a farm which had belonged to the bankrupt on the issuing of the commission. The assignees took possession of the farm, managed it for the benefit of the creditors, and purchased additional stock and farming utensils, and they had continued in possession several months before the goods were seized by the sheriff under the fieri facias:—the Court refused to stay the proceedings in the action of trespass.

The assignees of a bankrupt took possession of a farm, &c., and stocked it. The sheriff afterwards seized. In trespass by the assignees against the sheriff, the Court refused to stay proceedings.

2. To Remuneration for their Trouble*.
3. To refer to Arbitration†.
4. To appoint Bankrupt to superintend the Estate‡.

* Assignees, who are accountants, are not permitted to charge the estate for business done as accountants; and it makes no difference whether the accountant-assignee be a partner in a house of accountants, by whom such charges are made, or whether he act as such upon his own separate account. (*Ex parte Read*, 1 G. & J. 77). However proper it may be for creditors to make an allowance to the assignees for travelling expenses, yet the Chancellor or the commissioners have no authority to make such an order. (*Ex parte Bray*, 1 Rose, 145).

† By 1 & 2 Will. 4, c. 56, s. 43, it is enacted, "That, if the assignees of any bankrupt's estate shali agree to refer any matter in dispute with any party to arbitration, in such manner as they by law are empowered to do, such agreement of reference may be made a rule of the Court of Bankruptcy by this act constituted, and thereupon all such rights and remedies, duties and liabilities, shall accrue from such reference so made a rule of the said Court, in respect of arbitration and award, and non-performance of such award, and otherwise howsoever, as by law at present accrue upon any submission of reference made a rule of any of his Majesty's other courts of record."

‡ By 1 & 2 Will. 4, c. 56, s. 35, it is enacted, "That, in every case, the assignees may, with the approbation of the proper Subdivision Court, appoint the bankrupt himself to superintend the management of the estate, or to carry on the

(d) LIABILITIES OF.

1. *In general.*

EDGE v. PARKER, M. T. 1828. K. B. 8 B. & C. 697; S. C. 3 M. & R. 365.

The 44th section of 6 Geo. 4, c. 16, does not protect assignees in the seizing of goods supposed to be those of the bankrupt, and an action, after the lapse of three months since the act committed, is well brought.

ACTION of trespass against the defendant for breaking and entering the plaintiff's house, and taking goods, &c. The defendant was assignee of a bankrupt, but did not appear to be so on the record, and had entered the plaintiff's premises to take property supposed to belong to the bankrupt. It was contended, that the 6 Geo. 4, c. 16, s. 44, giving power to persons appointed by the commissioners to break open any house, &c., of the bankrupt, and seize upon the body or goods of such bankrupt, is confined to the house of the bankrupt, and not of other persons where such party or property may be; the 29th section giving the power to search the houses of third persons, requires also the warrant of a justice to be obtained by the party appointed by the commissioners.

The Court held, therefore, that where the assignees entered the premises of the plaintiff to seize goods of the bankrupt, it was not an act done in pursuance of the act; and that the plaintiff was not limited to his action within three months after the act committed. Doing an act "in pursuance of" an act, is applicable only to cases where the party can be considered as founding his act upon the power given him by the legislature.

ANSELL v. ROBSON, T. T. 1832. Ex. 2 C. & J. 610.

And assignees, who enter upon premises occupied by bankrupt as tenant from year to year, to complete works, are liable for rent until tenancy be legally determined.

A COACH-MAKER, who was tenant from year to year of certain premises, and had several coaches on hire, became bankrupt, and his assignees entered upon the premises to keep the coaches in repair, in pursuance of the bankrupt's contract; in August, the bankrupt's effects were sold, and the key of the premises delivered to the bankrupt, but the assignees paid the rent up to the Michaelmas following. In an action by the landlord for a quarter's rent due the Christmas following:—Held, that the assignees were liable until the tenancy was determined.

CLARK v. GILBERT, M. T. 1835. C. P. 2 Bing. N. S. 343; S. C. 2 Scott, 520.

Where a commission is set aside, and a new one issued, the assignees under the latter may recover the money received by the former assignees.

A COMMISSION issued against the bankrupt, under which S. was appointed sole assignee. The defendant acted as attorney to the bankrupt before the commission, and to the assignee afterwards, and had in his possession a lease of certain premises belonging to the bankrupt, and other deeds, on which he claimed a lien for professional business. A petition was afterwards presented by another creditor, and the commission was superseded on the ground of there being no petitioning creditor's debt, and a fiat issued, and the plaintiffs were appointed assignees. With a knowledge of the petition, and whilst it was pending, the assignee under the first commission, with the consent and concurrence of the defendant, sold the pre-

trade, for behoof of the creditors, and, in all or any other respects they may think fit, to aid them in administering the bankrupt's estate and effects in such manner, and on such terms, as they may think best for the benefit of the persons interested in the estate."

mises, the lease of which was in the possession of the defendant, and paid the proceeds of the sale to the defendant on account of his demands. The defendant was also suffered to receive other sums of money due to the bankrupt in satisfaction of his debt.

In an action for money had and received, the Court held, that the assignees under the fiat were entitled to recover back the money received, and also for rent received after the act of bankruptcy, the defendant having been guilty of a conversion by the sale, which the plaintiffs might waive, and recover the proceeds.

2. For the Acts of Agents.

RAW v. CUTTEN, T. T. 1832. C. P. 9 *Bing.* 96; S. C. 2 *M. & Scott*, 123.

THE provisional assignee of a bankrupt employed an agent to take possession of the bankrupt's effects, and manage the business, and receive monies; he, in consequence, received a considerable sum, and absconded without paying it over.

Per Cur.—The provisional assignee is not answerable for all sums received, and all acts done, by such agent, as if he were a guarantor; he is only to be answerable where he has been guilty of a default in the appointment and choice of such agent.

A provisional assignee is not responsible for the misconduct of an agent employed by him, where negligence cannot be imputed.

3. For the Acts of Co-Assignee*.

(e) DISABILITIES OF†.

HILLARY v. MORRIS, T. T. 1831. N. P. 5 C. & P. 6.

THE plaintiff, as an agent in the sale of stock and good-will of a business, engaged the defendant to pay him a liberal sum on the premium, upon the business being completed, prior to which the plaintiff became bankrupt:—Held, that, as the bankrupt upon the completion of the sale would have been entitled to the compensation for the work done prior to his bankruptcy, it was part of his estate; and that his assignees were only entitled to sue when the period of payment arrived; and that they could not, by disclaimer, give him a right to maintain the action.

Assignees cannot renounce a right of action vested in the bankrupt before his bankruptcy, and permit the latter to sue.

* Assignees are each separately answerable only for what they receive, and the misconduct of one assignee will not operate against his innocent co-assignee. (*Primrose v. Bromley*, 1 Atk. 88; *In re Litchfield*, Id. 87; *sed vide* 6 Geo. 4, c. 16, s. 104).

† The assignees are disqualified from purchasing any part of the bankrupt's estate; (5 Ves. 707; 6 Ves. 625; 8 Ves. 346; 10 Ves. 396); and an assignee purchasing the estate himself, or permitting his co-assignee to purchase it, will be sufficient cause of removal; (*Ex parte Reynolds*, 5 Ves. 707); and although the creditors, at a meeting convened by advertisement, sanction a sale of the bankrupt's effects at a valuation to one assignee, the Court will not order that the assignee should be allowed to become the purchaser, without a reference to ascertain whether the effects can be more advantageously disposed of. (*Ex parte Serle*, 1 G. & J. 187). Where an assignee had become the purchaser, and, upon an accidental increase in the value of the property, he afterwards sold it at a considerable advance, the Court, upon discovering that he ought not to have been a purchaser, ordered him to pay the difference of the sale to the general fund of the creditors. (*Ex parte Morgan*, 12 Ves. 6; *Ex parte Reynolds*, 5 Ves. 707).

BREWER v. SPARROW, T. T. 1827. K. B. 7 B. & C. 310; S. C. 1 M. & R. 2.

A wrongful sale of goods once affirmed by assignees, cannot afterwards be repudiated by them, and trover brought.

THIS was an action of trover by the plaintiff, assignee; it was referred to an arbitrator, who found specially, that the plaintiff, in his character of assignee, had clearly affirmed the defendant's acts, by receiving the balance of the account forming the remainder of the produce of the plaintiff's goods, which had been paid to the messenger.

The Court held, that he could not afterwards turn round and disavow those acts, even though the acts were such as would amount to a conversion of the bankrupt's effects, the Court observing, that the assignees may, if they please, affirm an act which has been done tortiously, and which, if not affirmed, would give them a right of action. That was decided in *Hodgson v. Smith*, 4 T. R. 211, and several other cases. It is now well established. When the act is beneficial to the estate, they generally adopt it; but it would be against all justice if they could be allowed to take the benefit, and yet disaffirm part of the transaction to the prejudice of the person whose act caused the benefit.

EMERY v. MUCKLOW, H. T. 1834. C. P. 4 M. & Scott, 263; S. C. 10 Bing. 401.

In replevin, an assignee cannot avow for rent due from the bankrupt, and also claim the property as assignee.

THE defendant avowed as a distress for rent, and also claimed the goods taken as assignee of M., and a verdict was taken generally for the defendant.

The Court held, that, having proceeded on the issue raised in the avowry for rent in arrear, and obtained a return of the goods, he could not be permitted also to set up title in third persons as a manifest contradiction on the record; it, therefore, directed the verdict to be entered for the plaintiff on the issue as to the title of the assignees, and that the defendant was not entitled to the costs of that issue.

KEARSEY v. CARSTAIRS, T. T. 1831. K. B. 2 B. & Ad. 716.

A covenant, that the lessor shall retake fixtures at a valuation, cannot, on the bankruptcy of the lessee, who gives up the lease, be enforced by the assignees.

IN covenant, the declaration stated, that premises were demised to Haviside, the bankrupt, by the defendants, for a term of years, by indenture made between them, before his bankruptcy, and that it was recited, by a covenant in the same indenture, that certain fixtures on the same premises had been purchased by H. on condition of their being repurchased as after mentioned; that it was agreed between the parties, and the defendants covenanted, that, immediately on the expiration or other sooner determination of the term, they, the defendants, should and would take the said fixtures, and pay such price for them to H., his executors or assigns, as they should be appraised at by two competent persons, to be named one by each side, or, in case they should not agree, that an umpire should be named by such two persons; that the fixtures were purchased and paid for by H.; and that he afterwards, during the term, became bankrupt, and the plaintiff was appointed his assignee; that the plaintiff declined to accept the lease, and Haviside, within fourteen days after notice thereof, delivered up the lease and premises pursuant to the statute 6 Geo. 4, c. 15, s. 75, to the defendants; the

same was accepted by them, and the term granted to H. was thereby determined; that a competent person was afterwards appointed by the plaintiff to appraise the fixtures, who requested the defendants to do the same; but that they did not, nor would, immediately on the determination of the time, accept the fixtures, and pay such price for the same as they should have been appraised at according to the covenant, but, on the contrary, would not appoint a competent person to appraise the fixtures, and neglected and refused to do so, and did not nor would pay the price or value of the same to H. before his bankruptcy, or to the plaintiff as assignee.

Per Cur.—The effect of the 75th section of the 6 Geo. 4, c. 16, is, that if the defendants, the lessors, had been desirous of purchasing the fixtures, they could not have compelled either the bankrupt or his assignee to appoint an appraiser; and as the agreement on this subject is mutual, if the covenant on one side falls to the ground, it follows that, upon every principle of justice, the other side should fall also. We are, therefore, of opinion, that, inasmuch as the defendants could not have maintained any action on this covenant, the plaintiff, who by his own act declined it, is also precluded from suing upon it.

(f) OF THEIR AUTHORITY BEING JOINT OR SEVERAL *.

(g) REMEDY OF ONE ASSIGNEE AGAINST ANOTHER †.

(h) OF DISPLACING OR REMOVING THE ASSIGNEE ‡.

* One assignee may give a good discharge for a debt owing to the estate, (1 Esp. 114), unless the other assignees have expressly dissented from it. (1 Esp. 172). But a release cannot be executed by one assignee without the authority of his co-assignee. (4 Esp. 220). An authority may be presumed if the co-assignee were present. (Ibid). A release by one of several assignees of a bankrupt, plaintiffs, if pleaded, will be set aside if suspicion be thrown on the transaction. (*Cole-ridge, J.—Johnson v. Holdsworth*, T. T. 1835, B. C., 4 D. P. C. 63). It should be observed, these cases were before 1 & 2 Will. 4, c. 56, appointing official assignees.

† If two assignees jointly retain a messenger, and one of them is compelled to pay his bill, he may sue his co-assignee for a contribution, without proving that the co-assignee has funds of the bankrupt's estate. (Holt, N. P. C. 245) But, if two of three assignees pay the bill of the solicitor, they cannot sue the other jointly for his proportion. (3 B. & P. 225).

‡ By 1 & 2 Will. 4, c. 56, s. 36, it is enacted, "That the Court of Review shall have power to remove any assignee of any estate, and the order of such Court thereupon shall be final and conclusive to all intents and purposes, and not subject to any review by the Lord Chancellor or otherwise." (See also 6 Geo. 4, c. 16, s. 66). The assignee may be removed for misconduct, (7 Vin. Ab. 77); or for making use of the bankrupt's property, (15 Ves. 470); permitting improper expenses by the commissioners, (7 Vin. Ab. 77); being insolvent, or because an account cannot conveniently or justly be taken whilst he remains, (12 Ves. 10); or being a bankrupt, (1 Atk. 96); or permanently resident in Scotland, (13 Ves. 274); or they may be removed upon their own petition, (3 Mad. 273); but he cannot be displaced on account of mere suspicion existing as to the fairness of his debt; it must actually have been set aside, (2 Rose, 68); nor are they removable from improper rejection by commissioners of a debt which would have turned the choice of assignees, if *bonâ fide*, (1 Buck, 201). Where an assignee becomes bankrupt, and is removed, his assignee as well as himself must join with the commissioners in executing an assignment to the new assignees. (*Ex parte Newton*, 1 Atk. 95). And where the commissioners and assignees were removed for misconduct, the assignees and the major part of the commissioners were ordered to join with the major part of the commissioners in the renewed commission, in making an assignment to the new assignees. (*Ex parte Halliday*, 7 Ves. 77).

STEAD *v.* THORNTON, H. T. 1832. K. B. 3 B. & Ad. 357, n.

Whether a newly appointed assignee can maintain an action for money had and received against the displaced assignee, is undecided.

THIS was an action for money had and received by a newly appointed assignee against the agent of the late assignee, who had been removed on the ground of insanity. It appeared, that the defendant had received the money as agent for his brother, the late assignee, who was insane. It was contended, there was no privity of contract, and therefore the action did not lie.

Per Cur.—We are not called upon to decide, whether such an action could be by one assignee against a removed assignee, or his authorized agent, because the defendant cannot be deemed his agent. The assignee being insane could appoint no agent.

(i) ACTIONS BY *.

1st.—*When they may sue.*

1. *With respect to the Form of Action.*

BLOXAM *v.* SANDERS, M. T. 1825. K. B. 4 B. & C. 941;
6 D. & R. 396.

To maintain trover, the assignees must have the right to possession as well as the right to the property.

THE defendants, hop factors, had sold to the bankrupt quantities of hops on different days, and delivered to him bought notes. Part of the hops were weighed, an account delivered, and invoices with samples sent—the usual time of paying for hops being proved to be the second Saturday after the purchase—but the notes were silent, both as to the times of payment as well as delivery; and, after notice, that they would be resold if not paid for by a certain day, a part was resold with the bankrupt's consent; and, upon his afterwards becoming bankrupt, the residue was sold without his assent or that of his assignees, and account sales were delivered to him, in which charges for warehouse rent, &c., were made from the time of sale, and the jury found that he had never rescinded the contract.

The Court held, that the buyer, or those standing in his place, had not an indefeasible right to the possession, and that insolvency without payment of the price defeated that right; and as, in order to maintain trover, the vendee must not only have a right of property, but of possession also, the assignees could not support the action.

* The assignees may bring actions at law without first calling a meeting of the creditors; (*Hussey v. Fidell*, 3 Salk. 59; *Spragg v. Bankes*, 5 Ves. 583); but, with regard to suits in equity, the 6 Geo. 4, c. 16, s. 88, follows the 5 Geo. 2, c. 30, ss. 34, 35, 38, by enacting, that assignees shall not institute any suit in equity, or submit any dispute to arbitration (but see as to arbitration, ante, p. 117), or make any composition with a debtor, without the consent of the major part in value of the creditors, who shall be present at a meeting, of which notice shall have been given in the London Gazette. By the same section of the 6 Geo. 4, the notice is required to be twenty-one days; and it is provided, that if one-third in value, or upwards, of the creditors who have proved under the commission, shall not attend such meeting, the assignees shall have power, with the consent of the commissioners, in writing, to do any of the matters aforesaid.

The assignees may maintain indebitatus assumpsit, (3 Wils. 304; 3 Blac. Rep. 287); or covenant, (7 T. R. 537); or debt, (2 H. Bl. 308); or trover, (1 Burr. Rep. 20; 1 Bl. Rep. 65; 1 Lev. 173); or ejectment, (2 M. & Selw. 446); or trespass, (1 T. R. 475). But assignees cannot sue for personal injuries to the bankrupt. (See Wm. Jones's Rep. 215).

BROOKE v. MITCHELL, H. T. 1840. C. P. 8 *Scott*, 739.

THIS was an action of trover by the assignees of a bankrupt. The declaration stated a possession of goods by the bankrupt before his bankruptcy, and a conversion by the defendant before the bankruptcy.

And it will not lie upon a conversion before the bankruptcy.

The Court held, that an action of trover, laying the conversion before the bankruptcy, could not be supported.

2. *As to bringing a second Action for want of Proof in the first Action*.*

3. *Election to proceed in Tort or on the Contract †.*

2nd.—*In what Manner to sue.*

1. *Where there are several Assignees ‡.*

2. *Where one has been removed §.*

3. *Where one has become Bankrupt.*

STEWART v. LEE, H. T. 1828. N. P. 1 *M. & M.* 158.

S. AND C., being joint assignees of a bankrupt, upon C. becoming also bankrupt, S., under an order and assignment, became sole assignee; but, previous to which, a check, for the amount of a bill of part of the bankrupt's estate, had been paid into the bankers of S. and C., directing the payment to "S. and C., assignees," &c., with the bankers' names written across the check. C. having also a separate account with the bankers, the check was paid into the bankers, with directions to place it to the latter account.

Where a check is payable to two joint assignees, and one of them becomes bankrupt and the other sole assignee, the latter may sue alone upon the check.

Held:—That if S. were entitled to the money, he might sue alone, without joining C., although a co-assignee at the time the check was paid in.

4. *Where one has died.*

BATES v. STURGES, T. T. 1831. C. P. 7 *Bing.* 585; S. C. 5 *M. & P.* 568.

THIS was an action of debt for a penalty of 209*l.*, under the 45th section of the 6 Geo. 4, c. 16, against the provisional assignee of the bankrupt, for not delivering up to the assignees all the estate of the bankrupt come to his possession. There were also money counts. The action was originally brought by one Weston, who

Assignee continuing by suggestion a suit commenced by former assignee, is entitled to

* Assignees, who have failed in one action for want of proving an act of bankruptcy, cannot litigate the point in a second action; though the record in the first suit is not a conclusive estoppel, it is admissible in evidence without being pleaded. (*Stafford v. Husk*, T. T. 1824, N. P., 1 C. & P. 403. See *Vooght v. Winch*, 2 B. & A. 662).

† The assignees may in general elect to proceed in assumpsit or trover. (3 Salk. 59; 12 Mod. 324; 2 T. Rep. 141). But, if they bring one species of action and fail, they cannot resort to the other. (2 Blac. Rep. 827; 3 Wils. 204).

‡ The assignees must join; and, in an action on contract, the omission of one is a ground of nonsuit. (1 Chit. Rep. 71; 2 Stark. N. P. C. 425).

§ Assignee removed must still join in an action brought by the other assignee, (5 East Rep. 407; 1 Smith, p. 87); unless a new one has been appointed. (10 East Rep. 61).

recover penalties, which, when recovered, would be assets.

had been chosen assignee by the creditors, and to whom the defendant made the assignment. Weston died after plea pleaded; but, under the 67th section of the act, a suggestion was, with leave of the Court, entered upon the roll, of his death, and also of the choice of the present plaintiff as the new assignee.

Per Cur.—The 6 Geo. 4, c. 16, s. 100, provides that all sums forfeited under the act may be sued for by the assignees; and the money so recovered shall be divided among the creditors. We cannot, therefore, distinguish this penalty from other property to be recovered.

WESTALL *v.* STURGES, E. T. 1830. C. P. 4 M. & P. 217.

A rule to suggest death of one assignee and appointment of another on record, is absolute in the first instance under sect. 67, 6 Geo. 4, c. 16.

THE plaintiff, Westall, who was the assignee of one Bates, a bankrupt, dying, and another assignee being chosen in his stead,—on motion for a rule nisi, to enter on the roll a suggestion of that fact, and substitute the name of the new assignee, in pursuance of the 67th section of the 6 Geo. 4, c. 16—

Per Cur.—It is not necessary, for this purpose, to have a rule to shew cause. The rule may be absolute in the first instance, and the defendant may deny the suggestion, if he can.

3rd.—*In what Court to sue*.*

4th.—*Declaration by.*

1. *When they must declare as Assignees†.*

2. *Mode of describing themselves as Assignees‡.*

3. *Of describing to whom the Cause of Action accrued§.*

KITCHENER *v.* POWER, E. T. 1835. K. B. 3 A. & E. 232; S. C. 4 N. & M. 710.

In trover by the assignees, a declaration, laying the possession and conversion after the bankruptcy, is sufficient.

TROVER by assignees of a bankrupt. The declaration contained two counts: first, on the possession of the bankrupt, stating a conversion after his bankruptcy; and the second, on the possession of the assignees, and also a conversion after the bankruptcy.

The Court held the declaration good. The plaintiffs, as assignees, sued the sheriff, in trover, for goods seized under a fi. fa.; after the issuing of a fiat, and before plea, the defendant delivered up the goods, which the plaintiffs accepted, without imposing any condition, and proceeded in the action.

* Assignees, where the smallness of the debt requires it, must sue in the Court of Requests. (1 B. & P. 11).

† Where the bankrupt *himself* could have recovered, the assignees must declare, as assignees, and derive their title through him; but where the right of action accrues after the act of bankruptcy, so that the bankrupt could not have recovered, the assignees may bring an action in their own name. (Cowp. 569; 1 Esp. 341).

‡ It is sufficient for the assignees to state in the declaration, that they are assignees of the estate and effects of A. B., a bankrupt, without setting out the petitioning creditor's debt, fiat, &c. (See 1 Lutw. 162; 2 Ld. Raym. 1548; Carth. 29).

§ In *Anon.*, 6 Mod. 131, it was decided, that, in *assumpsit*, a declaration by an assignee ought to state the promise as if made to the bankrupt, unless an express promise be made to the assignee.

4. *Of describing the Cause of Action.*

POWER v. BUTCHER, M. T. 1829. K. B. 10 B. & C. 329.

ASSUMPSIT for work and labour of the bankrupt in drawing and making out policies of insurance, and in effecting insurances for the defendants, for money paid by him for the defendants, for premiums and sums of money due to him from the defendants in respect of his having underwritten for their policies of insurance. There were also counts for work and labour. The question was, whether, upon this declaration, the plaintiff could recover commission.

Per Cur.—The count for work and labour is sufficient to cover the claim for commission.

Under the words "work and labour" in the declaration, and "insurance," the assignees of a bankrupt may recover commission.

5. *When under a Joint Commission.*

GRAHAM v. MULCASTER, E. T. 1827. C. P. 4 Bing. 115; S. C. 12 Moore, 327.

ACTION of assumpsit by the assignees of A. and B., bankrupts. The declaration contained counts on debts which accrued to A. and B., jointly, before their bankruptcy, and counts on debts which accrued to one of them separately. On demurrer to the declaration—

The Court said, the joint and separate property of both the partners passed to the assignees under the joint commission which was issued against them; and, although there might be a different mode as to the distribution of such property, viz. the one to satisfy the joint and the other the separate debts; yet such debts, as well as all those due to the bankrupts, were recoverable by the same assignees; and although the assignees are placed in the situation of trustees, yet we have nothing to do with them in their latter character, as we are only bound to see that they are empowered to recover the debts due to the partnership estate; and we have nothing to do with their distribution. If a debt be due to A., and another to B., the same assignees may recover both, and it is not necessary for them to bring two actions; if it were, it would be productive of inconvenience and expense. Although the two partners stood in different situations before the bankruptcy, yet the several debts due to each might be recovered by the joint assignees under a joint commission.

Assignees, under a joint commission against two partners, may recover separate debts due to each, as well as joint debts due to both.

See 3 B. Moore, 8; 8 T. R. 433; 15 East, 36.

6. *Of the Right of the Assignees to continue an Action commenced by the Bankrupt, and in what Cases the Suit abates*.*

* In an action at law, if the plaintiff become bankrupt, the action does not abate, but the assignees must proceed in the bankrupt's name till either an interlocutory or final judgment is obtained. (2 Wils. Rep. 372). And it is a general rule, that the assignees cannot make themselves parties to the record in any intermediate stage of the proceedings, but it must be immediately after judgment; though an interlocutory judgment is sufficient for this purpose. (1 T. R. 463).

A suit in equity does not abate by the bankruptcy of the plaintiff or defendant; (*Randall v. Munford*, 18 Ves. 424); and, therefore, the assignees may come in by supplemental bill; and if a motion be made to dismiss the original bill for want of prosecution, the assignees are allowed a month to adopt the suit. (*Munford v. Randall*, 1 Rose, 196).

5th.—Of Pleas to Actions by.

1. Denial of Plaintiff's Character as Assignee.

BUTLER v. HOBSON, H. T. 1838. C. P. 4 *Bing. N. S.* 290; S. C. 6 *D. P. C.* 409; S. C. 5 *Scott*, 798.

A traverse of the plaintiff's character as assignee, puts in issue the petitioning creditor's debt and act of bankruptcy.

TROVER by the plaintiff, as surviving assignee, for cattle, chattels, goods, &c. Pleas: 1st., not guilty; 2nd, that the plaintiff was not assignee of the estate and effects of the bankrupt, according to the statutes concerning bankrupts, in manner and form.

The Court held, that the 2nd plea put in issue the petitioning creditor's debt and act of bankruptcy.

BUCKTON v. FROST, M. T. 1838. Q. B. 1 *P. & D.* 102; S. C. 1 *A. & E.* 844.

And the Court of K. B. approved of that decision.

TROVER. Plea, that the plaintiffs were not assignees. At the trial, the plaintiffs put in the fiat, by which it appeared that the plaintiffs had been appointed assignees. It was contended, that they were bound to prove the petitioning creditor's debt and the act of bankruptcy; but they were not prepared to do so.

The Court held, that the plaintiffs were bound to prove both, upon the authority of *Butler v. Hobson*, supra.

2. Denial of the Property.

ISAAC v. BELCHER, T. T. 1839. Ex. 5 *M. & W.* 139; S. C. 7 *D. P. C.* 516; S. C. 8 *C. & P.* 714.

Assignees pleaded to trover a denial of plaintiff's property:—Held, that the defendant might shew that the goods were in the order and disposition of the bankrupt, and that the defendants as assignees sold the goods.

TROVER against assignees of a bankrupt. Plea, that the plaintiff was "not possessed," &c. It appeared that the plaintiff had sent the property in question to a person of the name of Joel, for safe custody. Joel subsequently became a bankrupt, and the defendants claimed the goods as his assignees, it being suggested that they were in his order and disposition as reputed owner. The learned Judge was of opinion, that this defence could not be given in evidence, under the plea of "not possessed;" but that the defendants should have specially pleaded, that the goods were in the order and disposition of the bankrupt.

Sed per Cur.—The proposed defence amounts to a denial of the plaintiff's right to the possession of the goods at the time of the conversion; and, if pleaded, would be bad on special demurrer.

3. Set-off. See post, Div. XVIII.

GROOM v. MEALEY, T. T. 1835. C. P. 2 *Bing. N. S.* 138; S. C. 2 *Scott*, 171.

To an action by assignees for money had and received, a plea of set-off must be restricted to the sum sued for as received

To declaration by assignees of a bankrupt for money had and received to their use as assignees, and also on an account stated with them as assignees, the defendant pleaded, that the bankrupt, before his bankruptcy, was indebted to him, on an account stated, in 300*l.*, which was still unpaid; and the plaintiffs, as assignees, are indebted to the defendant in that sum, which exceeds the sum claimed by them; and the defendant offered to set off the debt.

Per Cur.—The declaration is for money had and received by the defendants to their use as assignees. *Prima facie*, that must be taken to mean for money had and received *since* the bankruptcy, though, it is true, that there are cases where money may be recovered by them, which has been received *before* the bankruptcy. The set-off is not allowable for money received to their use since the bankruptcy; nor where it is claimed as the proceeds of a fraudulent preference. The present plea is general, and not having been guarded, so as to shew what the money was, which was received to the use of the assignees, it does not appear that this was a case to which the plea of set-off is applicable. The plea is therefore bad.

by the defendant before the bankruptcy.

4. Pending of another Action.

BIGGS v. COX, M. T. 1825. K. B. 4 B. & C. 920; S. C. 7 D. & R. 409.

ASSUMPSIT for goods sold and delivered by the bankrupt, before his bankruptcy, to the defendant. There were the usual other counts, upon promises made to the bankrupt; and there was also a count upon an account stated by the defendant *with the plaintiffs, as assignees, since the bankruptcy*. The defendant pleaded, in abatement, that the bankrupt, before his bankruptcy, sued out a writ against him, the defendant, and declared against him upon the very *same promises* in the plaintiffs' declaration mentioned, and that the suit thereupon was still pending.

The pending of a suit by the bankrupt cannot be pleaded to an action by the assignees for the same cause of action.

The Court were decidedly of opinion, that the plea was bad; inasmuch as the plaintiffs could not go on with the other action in the name of the bankrupt. If they were to attempt it, the defendant might plead the bankruptcy of the then plaintiff; and it followed, that if that action could not be carried on, the present must be allowed to proceed in the name of the assignees.

See 3 Wils. 304; 15 East, 622.

5. Of Special Pleas.

LESLIE v. GUTHRIE, E. T. 1835. C. P. 1 Bing. N. S. 697; S. C. 1 Scott, 683.

THE owner of the ship agreed with the defendant for the carriage of goods, &c., on a voyage, on which the ship was then actually engaged, for a certain sum for freight. The ship-owner being indebted to others, assigned to them the freight and other earnings of the vessel upon her then voyage, by way of security for debts larger in amount than the freight, &c., and gave the defendant notice of such assignment. He (the owner) afterwards became bankrupt; and, in an action by the assignees against the defendant, to recover the freight said to be due to the bankrupt before his bankruptcy, the defendant pleaded the facts as stated above. Upon demurrer—

The Court held the plea good; that the right to the freight was

To an action by the assignees, a plea, that the bankrupt had assigned the debt, in trust to discharge a claim due to A. B., of which defendant had notice, is a good plea*.

* Assignees sued for a debt due before the bankruptcy:—Held, that the defendant might plead a tender to the bankrupt, as to part, before the bankruptcy, and a set-off as to the residue. (Lord Tenterden, C. J.—Wells v. Crofts, M. T. 1830, N. P., 4 C. & P. 332).

not in the plaintiffs, but that it passed to the creditors of the bankrupt, by the assignment which he (the bankrupt) made before his bankruptcy, and of which assignment the defendant, debtor of the bankrupt, had notice.

ATKINSON v. DUCKHAM, M. T. 1835. C. P. 4 D. P. C. 327.

And the defendant may put in issue the bankruptcy, if doubtful, and plead a set-off and payment into court*.

ACTION was brought, by the assignees of a bankrupt for goods supplied by him; and it was proposed to plead, 1st, a denial of the bankruptcy; 2ndly, a mutual credit between the defendant and the bankrupt, upon which only a small sum was due; and, lastly, payment of the sum due into Court. A Judge, at Chambers, had refused to allow the plea denying the bankruptcy.

Tindal, C. J.—As there is some doubt as to the fact of the bankruptcy, we will grant a rule absolute.

ROLT v. WATSON, M. T. 1826. C. P. 12 Moore, 82; S. C. 4 Bing. 273.

But to action by assignees, defendant cannot plead a settlement of accounts with bankrupt, and the giving him a bill on which he is still liable.

DECLARATION in assumpsit by the assignee of a bankrupt, containing eight counts, the first six of which stated, that the defendant was indebted to the bankrupt, before his bankruptcy, for goods sold, &c.; and in each of which counts the defendant was stated to be indebted to the bankrupt in the sum of 50*l.*; and the declaration concluded by stating the damages to be that sum. Plea to these first counts—that, before the bankruptcy, an account was stated between the bankrupt and defendant of and concerning the several sums in those counts specified, and upon that occasion the defendant was found to be indebted to the bankrupt in the sum of 14*l.* 10*s.* 2*d.*, for which sum the bankrupt drew a bill upon the defendant, which he accepted for and on account of the said several promises in those six counts mentioned; and, by reason thereof, the defendant became and was, and still is liable to pay the bill.

The Court held, that such plea was bad on general demurrer, as it was pleaded to the whole of the plaintiff's demand in the first six counts, and did not state that the defendant was indebted no more than the amount for which the bill was drawn and accepted; and that the giving a bill for a less sum was not a satisfaction for the amount of the debt claimed.

WOOD v. SMITH, M. T. 1839. Ex. 4 M. & W. 522; S. C. 7 D. P. C. 214.

Assumpsit by assignees for money received before the bankruptcy. Plea, that, though the money was in the defendant's possession after the bankruptcy, it was received before, and then claiming a set-off:—Held, a bad plea.

ASSUMPSIT by assignees of a bankrupt for money had, &c., for their use, with a promise to themselves. Plea, that the money was had, &c., before the bankruptcy, and the bankrupt was indebted to the defendant in a larger sum, which the defendant claimed to set off. On demurrer—

Per Cur.—This plea discloses a good confession, but a bad avoidance. It confesses, that the money claimed was received before the bankruptcy, but the answer it alleges by way of set-off is no avoidance, for there are only two cases where money can be said to be received of assignees: when it has been received after the bankruptcy, or when it has been received before it and by way of fraudu-

* In trover, by the assignees, against an agent of the bankrupt, justifying a sale after an act of bankruptcy, the agent must plead the facts specially. (*Pearson v. Graham*, M. T. 1838, K. B., 6 A. & E. 899; S. C. 2 P. & D. 636).

lent preference. If received *after* the bankruptcy, the debt due from the bankrupt before his bankruptcy cannot be set off in an action by the assignees on a promise to themselves. If received *before* the bankruptcy, (as here admitted), the assignees must claim it as money paid by fraudulent preference; and, in such case, no set-off is allowable. The plea, therefore, is ill.

6. Of Pleading *de novo**.

6th.—Of Replications.

JONES v. BROWN, H. T. 1835. C. P. 1 *Bing. N. S.* 484; S. C. 1 *Scott*, 453.

To an action of trespass for breaking and entering the dwelling-house of the plaintiff, and taking his goods and chattels, the defendants suffered judgment by default as to the breaking and entering, and pleaded that one M. was declared and adjudged a bankrupt, and that certain persons were appointed his assignees, and that the said goods and chattels, in the declaration mentioned, were the goods and chattels of the said assignees, and which goods, &c., just before the said time when &c., and whilst the said M. remained and continued such bankrupt as aforesaid, were in the possession of the said M. And the defendants further say, that the goods, chattels, &c., being those of the said assignees, the plaintiff claimed title to the said goods, &c., under colour of a certain gift to him by the said bankrupt, whereas nothing passed by virtue of or under such gift; afterwards, and before the said time when &c., and whilst the said goods, chattels, and effects, in the said declaration mentioned, were the goods, chattels, &c., of the said assignees, and whilst the said M. remained such bankrupt as aforesaid, the said plaintiff seized and took, and became and was possessed of the said goods, chattels, &c.

The plaintiff replied, that the said goods and chattels were not the said goods and chattels of the said assignees, but were the goods and chattels of the plaintiff.

The Court held, that the replication only put in issue the single fact of property in the assignees, and that a verdict for the defendants, on the ground that the transfer to the plaintiffs was not *bonâ fide*, ought not to be disturbed.

To trespass for taking goods. Plea, that defendant took them as assignee of A. B. Replication, that they were not the goods of the defendant, as assignee:—Held, that the proceedings under the commission were admitted.

CARR v. BURDISS, H. T. 1835. Ex. 1 C., *M. & R.* 782; S. C. 5 *Tyr.* 309.

THIS was an action of trover by the assignees of a bankrupt for goods and chattels possessed by the bankrupt, as his own property, and converted by the defendants. Plea, that, before the bankruptcy, the bankrupt assigned and conveyed the said goods and chattels to the defendants by deed, and that, before the bankruptcy, they took possession thereof, and kept and retained possession thereof. Replication, that the defendants did not take possession of the said goods before the bankruptcy. A verdict was found for the plaintiff.

To an action by assignees. A plea, that, before the bankruptcy, the bankrupt assigned the goods to the defendant, who took possession. A

* After pleading the general issue, without notice of intention to dispute, the defendant may obtain leave to withdraw the plea, and plead *de novo*, with a notice. (*Gardner v. Slack*, 6 Moore, 489).

replication, traversing the not taking possession, is bad.

The Court, on a motion to enter up judgment for the defendants non obstante veredicto, gave the parties leave to amend, on the ground that the issue was an immaterial one, inasmuch as the conveyance of the property was complete without possession; and, if it were intended to be shewn that the bankrupt continued reputed owner, that should have been specially replied.

7th.—Evidence in Actions by.

1.—When strict Proof of Title to sue is required*.

1. Of the Commission or Fiat†.

2. Of the Trading.

GIBSON v. OLDFIELD, T. T. 1830. N. P. 4 C. & P. 313.

When part of the claim in the action by assignees could not have been recovered by the bankrupt, the proceedings after notice not sufficient proof of trading ‡, &c.; but the assignee may elect to recover the other portions.

ACTION by assignees against defendant for not accounting; it appeared that some of the goods had been consigned to the defendants very shortly before the bankruptcy. Notice of disputing the trading, the petitioning creditor's debt, and act of bankruptcy had been given.

Lord Tenterden, C. J., held the proceedings under the commission are not sufficient proof of the trading, &c., to entitle the assignees to go for their whole claim, and they will, on such evidence, be restricted to that part of their claim which the bankrupt could have recovered.

BRINLEY v. KING, H. T. 1825. N. P. 1 C. & P. 646; S. C. by name of *Bromley v. King*, 1 R. & M. 228.

So, statements made by a bankrupt respecting his trade to a creditor are not evidence to prove the trading.

To prove the trading, a witness was asked, what did you learn from the bankrupt, in the conversations you may have had with him before his bankruptcy, respecting his transactions in trade?

Best, C. J.—I think it is a general rule, that nothing which a bankrupt says can be given in evidence to support his commission. All that relates to the bankruptcy should be proved by other witnesses.

See *Parker v. Barker*, 3 Moore, 226; S. C. 1 B. & B. 9.

* Formerly, it was necessary, in all cases where the plaintiff sued as assignee, to adduce strict evidence:—

- 1st. Of the commission.
- 2nd. Of the trading.
- 3rd. Of the act of bankruptcy.
- 4th. Of the petitioning creditor's debt.
- 5th. Of the assignment.

But, by the 49 Geo. 3, c. 121, commonly called Sir Samuel Romilly's Act, important and valuable alterations were introduced, dispensing, in certain cases, with proof of the preceding requisites to support the commission. The cases decided upon that statute and the clauses of the 6 Geo. 4, c. 16, will be inserted in the present division.

† The fiat is proved by its mere production, under the seal of the Court of Bankruptcy, established by 1 & 2 Will. 4, c. 56, the same as the commission was under the Great Seal.

‡ In *Parker v. Barker*, (3 Moore, 226; S. C. 1 B. & B. 9), it was decided, that assertions by a person, that he was partner with a trader who became bankrupt, are sufficient to establish such trading. But, in a late case at Nisi Prius, this decision has been doubted; (*Bromley v. King*, H. T. 1825, N. P., 1 R. & M. 228); and such assertions have been considered as coming within the general principle, as to the inadmissibility of the bankrupt's declaration.

3. Of the Act of Bankruptcy.

ODY v. COOKNEY, M. T. 1836. Ex. 1 Tyr. & G. 537.

THE possession of the stock was shewn in the bankrupt only down to July, and the fiat was in the January following, and no proof of any assignment:—Held, that there was no evidence of an act of bankruptcy to go to the jury, and a nonsuit proper, as an act of bankruptcy cannot be presumed, it must be proved.

An act of bankruptcy cannot be presumed, it must be positively proved*.

RIDLEY v. GYDE, M. T. 1832. C. P. 9 Bing. 349; S. C. 2 M. & Scott, 448.

THE act of bankruptcy on which the plaintiffs relied was a warrant of attorney and bill of sale, alleged to have been given by White to the defendant by way of fraudulent preference, and in contemplation of bankruptcy. A creditor, to whom White had made promises to give no preference to any other creditor, was called as a witness; he stated:—"I asked what the security was which he had given to Gyde; he told me he did not know. I asked if he had made an assignment to Gyde; he said he did not know. I asked if he had given a warrant of attorney; he said he did not know what the security was. I told him he must be a very great rascal to go and give security after his promise to me; he said he owed Mr. Gyde the money, and no one could blame him for taking care of his relations." The counsel for the defendant objected to this evidence; but *Tindal*, C. J., before whom the cause was tried, allowed it to be received. On motion for a new trial—

A conversation between A. and B., with respect to a security given by A. to C., is admissible in evidence to support an act of bankruptcy by A.

Per Cur.—The evidence was properly received, the act of bankruptcy on which the plaintiff relied in the present case was a fraudulent transfer by way of preference, which is not capable of being proved by any single incident, but can only be established by shewing the situation of the bankrupt, and his conduct and language with reference to the whole transaction.

MERLE v. MOORE, E. T. 1826. N. P. 2 C. & P. 275; S. C. R. & M. 390.

To prove the act of bankruptcy, the bankrupt's attorney was called, and asked as to the circumstances in which his client was at the time a deed constituting the act of bankruptcy was executed. His acquaintance with the facts was derived from communications made to him by the bankrupt in his character of attorney. It was objected, that these were confidential communications, and could not be inquired into; but—

The admissions made by a bankrupt to his attorney are receivable with the former's consent†.

Best, C. J.—It is for the bankrupt to object, and if he does not, I shall receive the evidence.

* And the deposition of the act of bankruptcy by a bankrupt himself must shew an intent to delay creditors. (*Tucker v. Jones*, E. T. 1824, C. P., 2 Bing. 2; S. C. 9 Moore, 24, by name of *Tateman v. Jones*).

† Although the depositions shew a prior act of bankruptcy, the Court will not infer that petitioning creditor was cognizant of the fact. (*Thackrah v. Wood*, 1820, N. P., 3 Stark. 141).

JACOBS v. LATOUR, T. T. 1826. C. P. 2 M. & P. 201; S. C. 5 Bing. 131.

After depositions have been used at the trial without opposition, they cannot subsequently be objected * to.

At the trial of an action of trover, the act of bankruptcy was established by the usual depositions under the 6 Geo. 4. On motion for a nonsuit, it was contended there was not sufficient evidence of an act of bankruptcy, the depositions being founded on the evidence of the bankrupt himself.

Sed per Cur.—It is now too late to raise any question as to their sufficiency; they were used at the trial without objection, and, if insufficient, they should have been opposed at the trial.

TOPE v. HOCKIN, T. T. 1827. K. B. 7 B. & C. 101; S. C. 9 D. & R. 881.

An assignee cannot avail himself of an act of bankruptcy, of which the petitioning creditor would be estopped from availing himself.

ACTION for money had and received of plaintiffs as assignees of Ford. Payments had been made by the defendant, on the 18th of October. The commission issued, on acts of bankruptcy committed, on the 21st of November and 1st of December following. It issued on the petition of John Lyndon. The plaintiffs endeavoured to overreach these payments by proof of an act of bankruptcy committed on the 1st of October. That act of bankruptcy was the execution of a deed conveying all the bankrupt's goods and chattels in Devonshire, the county of his residence, to one Henry Mudge and this John Lyndon, for the purpose of discharging a debt due to them. Lyndon was privy to this transaction.

Per Cur.—Assignees, deriving their rights under and being connected with the petitioning creditor, cannot avail themselves of an act of bankruptcy, which he would not be allowed to insist on, as where he was a party to a prior concerted and secret act of bankruptcy, although another creditor might do so for the purpose of supporting the commission.

4. *Petitioning Creditor's Debt.*

SMALLCOMBE v. BRUGES, H. T. 1824. Ex. 13 Price, 136; S. C. M'Clel. 45.

An acknowledgment as to petitioning creditor's debt, after act of bankruptcy, is inadmissible.

TROVER by plaintiff as assignee of Smallcombe. The plaintiff proved the trading by buying and selling beans and flour; and an act of bankruptcy to have been committed by his having been arrested on the 21st of November, 1821, and continuing in prison till the 7th day of April following, when he was discharged under the Insolvent Debtors' Act, and that, on the 25th of June, 1822, a commission of bankrupt was issued against Watts, on the petition of Anne Smallcombe, as administratrix of the estate and effects of James Smallcombe, who died intestate on the 9th day of July, 1820. In support of the petitioning creditor's debt, it was proved, that, on the 10th of June, 1807, the bankrupt and his son, James Watts, jun., made their joint and several promissory note for 100*l.*, payable with interest to the intestate, James Smallcombe; and it was also

* The not paying or securing a debt for 100*l.* by an M. P. may be proved by other evidence than the creditor himself. (*Barton v. Green*, H. T. 1828, N. P., 3 C. & P. 306. See 2 Rose, 211).

proved, that, in the month of May, 1822, the bankrupt told Mr. H. Sanders, the plaintiff's attorney, who called upon the said bankrupt in consequence of a notice under the Insolvent Debtors' Act, that he, the said bankrupt, owed the executrix or administratrix of James Smallcombe 215*l.* for money borrowed.

The Court held, that the acknowledgment by the bankrupt, made after the act of bankruptcy, though before the issuing of the commission, is inadmissible as evidence, in an action by his assignees, to prove the petitioning creditor's debt.

STAFFORD *v.* CLARK, M. T. 1823. N. P. 1 C. & P. 26.

THE depositions under the commission were put in, (without notice to dispute), which clearly proved the trading, the act of bankruptcy, and the petitioning creditor's debt. On defendant's counsel wishing to look at the other depositions—

Burrough, J., ruled, that those in evidence were all that could be read by the defendant's counsel.

When proceedings are produced to prove the petitioning creditor's debt, opposite counsel have only a right to look at those which are necessary to support the fact for which they are produced*.

5. Of the Assignment.

GOMERSALL *v.* SERLE, M. T. 1827. Ex. 2 Y. & J. 5.

ACTION by assignees against defendant on a bill of exchange. On the trial, the plaintiff was unable to prove the execution of the provisional assignment by the attesting witness. It was contended, that, as the proceedings were enrolled, such evidence was unnecessary. The point was reserved; and, on motion for a new trial—

The Court held, that the 95th and 96th sections of the 6 Geo. 4, did not dispense with the proof of the execution of the assignment.

Before 1 & 2 Will. 4, c. 56 †, the assignment was proved by the attesting witness, notwithstanding it was entered of record pursuant to 6 Geo. 4, c. 16, s. 96 †.

6. Of the Assignees being such§.

INGLIS *v.* SPENCE, M. T. 1834. Ex. 1 C., M. & R. 432; S. C. 5 Tyrw. 8.

ASSUMPSIT by assignees of a bankrupt. Plea, denying the bankruptcy, and the plaintiffs' title as assignees. Notice to dispute the bankruptcy had been given. The plaintiffs gave in evidence an application by the assignees to the defendant for payment of the debt, and a letter from him in return, requesting time, and promis-

Letters written to the assignees' solicitor, recognizing them as such, are *prima facie*

* Where no notice to dispute is given, the deposition of the petitioning creditor's debt is sufficient proof, not only of the debt, but of the character in which it is claimed. (*Skaife v. Howard*, H. T. 1824, K. B., 2 B. & C. 560; S. C. 4 D. & R. 37). Where a petitioning creditor's debt has been substituted, under the stat. 6 Geo. 4, c. 16, s. 18, it is sufficient to prove the petition to the Chancellor, for the substitution of the new debt, the Chancellor's order referring the sufficiency of the debt, &c., to the commissioner, and the finding of the commissioner thereon. It is not necessary to produce the Chancellor's order confirming such finding.

† See ante, div. *Assignment*.

‡ In practice, however, it was not usual to call for proof of the execution, unless notice had been given that such evidence would be required. (See *Hunt v. Connor*, M. T. 1827, cited 2 Y. & J. 10; and Chit. Stat. 110).

§ By 1 & 2 Will. 4, c. 56, s. 29, it is enacted, "That a certificate of the appointment of such assignees, purporting to be under the seal of the said Court of Bankruptcy, shall be received as evidence of such appointment in all Courts and places whatsoever without further proof."

evidence of their capacity, notwithstanding a notice to dispute*.

ing payment, and rested their case upon this admission. For the defendant, it was urged, that this was insufficient; but the learned Judge held, that it was enough *primâ facie* to call upon the defendant for an answer, and none being given, the plaintiffs recovered a verdict. On motion for a new trial—

The Court refused to interfere, observing, the 6 Geo. 4, c. 16, s. 91, renders it unnecessary to give evidence of the bankruptcy, unless there has been notice to dispute it; but if notice has been given, still an admission by the defendant is receivable in evidence to prove it.

DAVIES *v.* BURTON, M. T. 1829. N. P. 4 C. & P. 166.

So, where defendant has agreed with assignees, that if he was not holden to bail, he would admit every fact except the merits, he cannot dispute the title of the assignees.

A DEFENDANT, in a suit by assignees of a bankrupt, was told at an interview with the attorney for the assignees, (which was arranged by his own attorney, but which he thought proper to attend alone), that his attorney had proposed, that he should admit every fact, except the merits, provided the plaintiffs would waive their right of holding him to bail, and he was asked whether that proposal was made with his authority? He replied, that it was; and that he was ready to carry it into effect, as the only question he wished to try was, whether he was liable on the undertaking he had given.

Held, that this amounted to an admission of the right of the assignees to sue, although no mention was made of it in the conversation. Semble, that it would have been otherwise, if, without further explanation, he had only said, that he wished to try upon the merits. Held, also, that having received advantage from the admission in the waiver of the right to hold to bail, he could not afterwards withdraw it, and insist upon proof of the bankruptcy.

7. *When dispensed with.*

POPE *v.* MONK, M. T. 1825. N. P. 2 C. & P. 112.

A debtor, who has admitted the right of the assignees to receive the demand, dispenses with the usual proofs in support of the commission.

ACTION for goods sold by bankrupt. The defendant, on being applied to by a person whom he knew to be the collector of debts for the assignees, said, "I will collect and pay the money."

It was decided, that such promise is an admission of the right of the assignee, and renders it unnecessary in an action for the money to give the usual proofs in support of the commission.

2.—*Of the Evidence when strict Proof of their Title is dispensed with by Statute.*

1. *Of the Provisions of the 6 Geo. 4, c. 16, and herein of the Inrolment †.*

KAY *v.* GOODWIN, E. T. 1830. C. P. 6 Bing. 576; S. C. 4 M. & P. 341.

THE commission issued against Sherwin, in March, 1822. One

* If the defendant denies the plaintiff was assignee, in trover by the plaintiff as assignee of a bankrupt, the fiat inrolled and the certificate of appointment enrolled, are sufficient proof that the plaintiff is assignee. (*Parke, B.—Scott v. Thomas*, 1834, N. P., 6 C. & P. 611).

† In all actions at law and suits in equity by or against assignees, the commission and proceedings were made evidence by the 49 Geo. 3, c. 121, of the

The 6 Geo. 4, c. 16, is not

Button deposed, before the commissioners, to an act of bankruptcy committed by Sherwin, in May, 1821, by a denial to a creditor. After the passing of the 6 Geo. 4, c. 16, (Button having died in the interim), and consequently after the repeal of the 5 Geo. 2, c. 30, the deposition was inrolled under both those acts; and, at the trial, it was offered in evidence, as proof of an act of bankruptcy to support the commission. On the part of the defendant, it was objected, that this deposition was not receivable in evidence by virtue of the supposed inrolment under the 5 Geo. 2, c. 30, s. 41; that statute having at the time of such inrolment been repealed; and that the 6 Geo. 4, c. 16, gave no power of inrolling the proceedings on commissions issued under any prior statute. The Judge thereupon rejected the deposition, and the jury returned a verdict for the defendant.

retrospective as to making proceedings evidence*.

The Court refused to interfere, being of opinion, that the 92nd, 95th, and 96th sections of the 6 Geo. 4, c. 16, relating to inrolment of the proceedings in bankruptcy, apply only to commissions sued out after the passing of that act.

MUSKETT *v.* DRUMMOND, M. T. 1829. K. B. 10 B. & C. 153; S. C. 5 M. & R. 210.

A COMMISSION against T., issued upon the petition of the assignees of K., who, after an action of trover, brought by them to recover the goods of Tims, a notice to dispute having been given, finding their debts as petitioning creditors insufficient, applied to the Lord Chancellor, under 6 Geo. 4, c. 16, s. 18, that, upon satisfactory proof of an existing debt to M., the commission might be proceeded in, upon which an order to that effect was made; and at the time, in order to support the commission against K., the petitioners merely produced the proceedings under his commission.

So, where the petitioning creditor is himself an assignee of a bankrupt, the depositions under the latter commission are not within the 92nd section 6 Geo. 4, c. 16.

The Court held, 1st, that, as the petitioners sued as assignees of T., and not as assignees of K., those proceedings were not admis-

sible and the act of bankruptcy, unless the party at the risk of costs gave notice of his intention to dispute any of such matters. And now the 6 Geo. 4, c. 16, s. 90, has extended the provisions of the 49 Geo. 3, c. 121, s. 61, to commissioners, and any person acting under their warrant; and directs that "no proof shall be required at the trial" of the debt, trading, and act of bankruptcy, unless notice, &c. By 6 Geo. 4, c. 16, s. 92, it is provided, that, in an action for any demand for which the bankrupt might have sued, the depositions are conclusive, unless the bankrupt contests the commission within two calendar months, if in England, or twelve months if abroad, with power, if such time has not elapsed, for the defendant to pay the money into court. And the 9th section directs, that, if the commission be afterwards superseded, persons from whom the assignees have recovered, or bona fide paying the assignees, &c., shall be discharged from all claims by the bankrupt. By s. 96, it is enacted, that, in all commissions issued after this act shall have taken effect, no commission of bankruptcy, adjudication of bankruptcy by the commissioners, or assignment of the personal estate of the bankrupt, or certificate of conformity, shall be received as evidence in any court of law or equity, unless the same shall have been first so entered of record as aforesaid.

* A letter, produced before the commissioners, and copied by the solicitor by a copy machine, is not evidence without reading the examination. (*Alderson v. B. —Holland v. Reeves*, H. T. 1835, N. P., 7 C. & P. 36).

The proceedings under sect. 92, 6 Geo. 4, c. 16, are evidence where the bankrupt might have sued, but not where the assignees rely on a cause of action alleged to have accrued to them since the bankruptcy. (*Jones v. Fort*, T. T. 1828, N. P., 1 M. & M. 196). And proceedings under a commission are inadmissible in a collateral action if it would prejudice the assignees. (*Laing v. Barclay*, 1820, N. P., 3 Stark. 38).

sible; the 91st and 92nd sections being confined to actions brought by the bankrupt's own assignees for a debt or demand for which he might have sued.

JOHNSON *v.* GILLET, T. T. 1828. C. P. 5 *Bing.* 5; S. C. 2 *M. & P.* 8.

A court of common law has no authority to compel parties to inrol proceedings under 6 Geo. 4, c. 16, s. 96.

A RULE was applied for, calling on the assignees of a bankrupt to shew cause, why they should not be required to inrol the proceedings under the commission, in pursuance of the 95th and 96th sections of the 6 Geo. 4, c. 16.

The Court said, the act gave them no power to interfere, but that the application should be made to the Lord Chancellor.

KEY *v.* GOODWIN, M. T. 1829. C. P. 6 *Bing.* 576.

Proceedings under a commission in 1822, and not inrolled until 5 Geo. 4, c. 30, was repealed, cannot be inrolled under 6 Geo. 4, c. 16, s. 96 *;

PROCEEDINGS under a commission, issued in 1822, were not inrolled until after the repeal of 5 Geo. 4, c. 30, by the 6 Geo. 4, c. 16.

Held, that by the repeal, the former act being as if it had never existed, and the power of inrolling under it gone, and the 6 Geo. 4, c. 16, s. 96, applying only to commissions issued after that act took effect, and not operating on commissions that were issued before it passed, it gave no power to inrol the proceedings in question, and consequently, that not having been inrolled during the continuance of the previous statute, they were properly rejected in evidence.

KEY *v.* COOK, H. T. 1829. C. P. 2 *M. & P.* 720.

for the 6 Geo. 4, c. 16, s. 92, is not retrospective, and only applies to commissions issued after the passing of that act.

A COMMISSION issued against the bankrupt on the 2nd March, 1822, since which time the land in question came to the possession of the bankrupt, but the defendant had continued to occupy it from 1823 to 1828. To recover the rent this action was brought by the plaintiffs as assignees. The bankruptcy being disputed, the proceedings in bankruptcy on being produced appeared to have been inrolled in 1828, and the witness who proved the act of bankruptcy being dead, the depositions were relied on as being admissible under the 6 Geo. 4. They were, however, objected to on the ground, that that statute only applied to commissions issued since the act came into force. And the Court held, that the 92nd section of the 6 Geo. 4, c. 16, is prospective and not retrospective, and therefore only applies to commissions issued after that statute came into operation.

TATTLE *v.* GRIMWOOD, E. T. 1826. C. P. 3 *Bing.* 493; S. C. 11 *Moore*, 432.

The certificate is evidence, though not entered of record.

A COMMISSION of bankrupt was sued out in January, 1825, and the party obtained his certificate under it in the month of November following:—

Held, that such certificate was admissible in evidence, without having been inrolled or entered of record, according to the provisions of the statute, 5 Geo. 4, c. 98, and 6 Geo. 4, c. 16.

* When the assignment is produced, duly inrolled, further proof of its execution is not requisite. (*Tucker v. Barrow*, M. T. 1827, N. P., 1 *M. & M.* 137; S. C., 3 *C. & P.* 85).

2. Of the Depositions and Examinations before the Commissioners, &c.*

RAWSON v. HAIGH, H. T. 1824. 1 C. & P. 77.

Per Lord Gifford, C. J.—It is often supposed, that when no notice was given of disputing the act of bankruptcy, it was intended to be admitted; but the truth was, that the only difference made by the act was, that the depositions were made evidence where there was no notice to dispute, but upon the depositions as good an act of bankruptcy must be shewn as if there was notice and witnesses called to prove the act of bankruptcy.

On the face of the depositions the necessary facts must be as strictly made out, as they could be required to be done by witnesses.

 FOX v. MAHONEY, H. T. 1832. Ex. 2 C. & J. 325; S. C. 2 Tyrw. 285.

TROVER. The conversion proved was after the act of bankruptcy. The property had been deposited with the defendant for a specific purpose, and converted by him in breach of the bailment, so that the bailor might have sued if he had not become bankrupt. The bankruptcy was proved by the depositions and proceedings only. The defendant having obtained a verdict—

Wherever a bankrupt could sue, the depositions are properly receivable and conclusive.

The Court were of opinion, that the intention of the legislature was, that in cases where, in the event of there being no bankruptcy, the bankrupt could have maintained an action, and where no such notice as is prescribed in the section has been given, the depositions should be received as conclusive evidence; and they thought so, on the ground, that, if the defendant is not bound to pay the assignees, he is bound to pay the bankrupt.

 YOUNG v. TIMMINS, M. T. 1830. Ex. 1 C. & J. 148; S. C. 1 Tyrw. 15.—S. P. SMITH v. WOODWARD, 1831. N. P. 4 C. & P. 541.

NOTICE to dispute the petitioning creditor's debt had been duly given. The debt sought to be recovered was one for which the bankrupt might have sued. The depositions were put in as proof of the petitioning creditor's debt. Twelve months had elapsed between the adjudication and the trial. The defendant proposed to prove, that the petitioning creditor's debt was a fraudulent contrivance between the bankrupt and the petitioning creditor, who was also one of the assignees, and a party to the record. The Judge rejected the evidence, on the ground, that the depositions were conclusive evidence of the debt under the statute, 6 Geo. 4, c. 16, s. 92.

And evidence to impeach the petitioning creditor's debt should be rejected †.

* By 1 & 2 Will. 4, c. 56, s. 38, it is enacted, "That the said Judges and commissioners of the said court of bankruptcy shall, in all matters within their respective jurisdictions, have power to take the whole or any part of the evidence, either *vivâ voce* on oath, or upon affidavits, to be sworn before one of the said Judges or commissioners, or a master ordinary or extraordinary in Chancery, as the said Court may in any case direct, or as the Lord Chancellor may from time to time prescribe by any general rule to be made by virtue of this act."

† The reception of the depositions in evidence depends upon whether the bankrupt could or could not have brought the action himself. They are not so conclusive as to exclude the defendant from stating that the bankrupt could not have sued. (*Hare v. Waring*, H. T. 1838, Ex. 3 M. & W. 376). Where the examination of the defendant is *primâ facie* admissible for the plaintiffs, the Court will not allow the opposite party to interpose evidence to qualify or

In which rejection the Court, on a motion for a new trial, concurred, observing, that the depositions are in the nature of an estoppel. The remedy is elsewhere.

ROWLAND *v.* ASHBY, H. T. 1825. N. P. 1 C. & P. 649; S. C. 1 R. & M. 231.

What may have passed before the commissioners may be given in evidence, though not taken in writing.

A WITNESS, who produced the written examination under the commission, was asked, whether the plaintiff had not, under the examination, made certain admissions before the commissioners. It was objected, that this parol testimony was not receivable; but *Best*, C. J., received it, and said, "I shall presume, in the first instance, that every thing that was material was taken down, but, if evidence is offered to me of the contrary, I think I must receive it."

3. Of the Notice to dispute the Proceedings under the Commission, and its Effect*.

1. Form of.

TRIMLEY *v.* UNWIN, E. T. 1827. K. B. 6 B. & C. 537; S. C. 9 D. & R. 548.

A notice must state what particular ingredient in the bankruptcy will be disputed.†

THE defendant had given notice, that he intended to dispute "the bankruptcy," not stating whether it was the trading, the act of bankruptcy, or the petitioning creditor's debt.

The Court observed, that the notice was too general, and that the act required in terms the stating "which of such matters" it was intended to dispute. They would, however, let the defendant in to give a proper notice.

2. Within what Time to be given.

LAWRENCE *v.* CROWDER, E. T. 1828. 1 M. & P. 511; overruling S. C. 3 C. & P. 230.

The notice must be given by a defendant at or before the time of pleading, and if a plea has been delivered without notice, the omission can

ACTION by the assignee of a bankrupt: a plea was delivered to the plaintiff's attorney by a clerk of the defendant's attorney, who, through mistake, omitted to deliver with it a notice to dispute the bankruptcy. A few hours after, as soon as the omission was discovered, the plea was fetched away, on the pretence that there was some error in it, and, in the course of the same day, a fresh plea was delivered, accompanied by a notice:—It was held at *Nisi Prius*, that,

shew that it was inadmissible. (*Jones v. Fort*, T. T. 1828, N. P., 1 M. & M. 196; S. C. 4 M. & R. 547; S. C. 9 B. & C. 764, not S. P.) Examinations before commissioners of bankrupts are evidence in actions against their assignees, even in an action of trover, which is a demand within 6 Geo. 4, c. 16, s. 92. (*Rebbon v. Alexander*, E. T. 1828, C. P., 1 M. & P. 448).

* In all actions at law and suits in equity by or against assignees, the commission and proceedings were made evidence by the 49 Geo. 3, c. 121, of the debt and act of bankruptcy, unless the party, at the risk of costs, gave notice of his intention to dispute any of such matters. And now the 6 Geo. 4, c. 16, s. 90, has extended the provision of the 49 Geo. 3, c. 121, s. 61, to commissioners, and any person acting under their warrant; and directs, that "no proof shall be required at the trial" of the debt, trading, and act of bankruptcy, unless notice, &c. But this does not apply to an issue upon an interpleading rule. (*Lott v. Melhille*, 9 D. P. C. 882).

† And proof of that is sufficient. (*Porter v. Walker*, 1 Scott, N. S. 568; S. C. 1 M. & G. 686).

although the time for pleading had not expired, the notice was not sufficient under the 90th section of the 6 Geo. 4, c. 16; but the Court of Common Pleas, under the circumstances, granted a new trial, on payment, by the defendant's attorney, of the costs as between attorney and client. —

only be supplied by withdrawing plea, and pleading *de novo*.

FOLKS v. SCUDDER, T. T. 1827. N. P. 3 C. & P. 232.

TRESPASS to try the validity of the commission. The plaintiff's attorney, on proving the delivery of notice to dispute, stated, it was not delivered till after issue joined; but added, that the defendant's attorney had said that was of no consequence, the notice was sufficient, it would do very well; but the defendant denying this statement—

Whether the attorney for the defendant has or has not agreed to receive a notice to dispute after the proper time, cannot be investigated at *Nisi Prius*.

Best, C. J., refused to try the question as to whether the attorney had agreed to accept the notice after the due time or not, at *Nisi Prius*, and nonsuited the plaintiff.

3. *Service of.*

WIDGER v. BROWNING, M. T. 1826. 2 C. & P. 523; S. C. 1 M. & M. 27.

NOTICE of disputing the act of bankruptcy had been left with a clerk of the defendant at his counting-house before issue joined:—

Service of notice on the clerk of the assignees at the latter's counting-house suffices.

Tenterden, C. J., held the service sufficient.

See *Howard v. Ramsbottom*, 5 *Taunt.* 524.

4. *Effect of, and Effect of omission to give Notice.*

NORMAN v. BOOTH, E. T. 1830. K. B. 10 B. & C. 703.

THE assignees brought an action to recover from a sheriff the amount of goods seized after an act of bankruptcy; and the sheriff had given no notice of his intention to dispute the commission; the question was, whether it is necessary for the assignees to prove that, at the time of the act of bankruptcy on which they rely, there was a good petitioning creditor's debt.

The omission to give notice to dispute, it seems, admits every thing to support the commission*.

According to Lord *Tenterden* and Mr. Justice *Parke*, such proof is not necessary, unless the defendant shew some other act of bankruptcy. According to Mr. Justice *Bayley* and Mr. Justice *Littledale*, such proof is necessary.

MACBEATH v. COATES, M. T. 1826. C. P. 4 Bing. 34; S. C. 12 Moore, 122.

By the statute 6 Geo. 4, c. 16, s. 90, it is enacted, That, in actions by or against any assignee acting under a commission, no proof shall be required, at the trial, of the petitioning creditor's debt, unless the other party in such action, if plaintiff, should give notice in writing to such assignees, that he intends to dispute it. In an

And, since 6 Geo. 4, c. 16, s. 92, where notice has not been given, no other proof of

* Notice must be given under the 6 Geo. 4, c. 16, if the party intends to dispute the act of bankruptcy, &c. A plea, that "A. B. was not duly declared a bankrupt," is not a notice in point of law; (*Gaselee, J.—Moon v. Raphael*, T. T. 1835, N. P., 7 C. & P. 115); and the same rule holds where not given within the time prescribed. (*Earlth v. Schroder*, M. T. 1827, N. P., 1 M. & M. 24).

petitioning creditor's debt is requisite than the depositions, though an imperfect one appears on the face of it.

action by a person, against whom a commission had issued, against his assignees for assaulting him and entering his house, they produced the proceedings before the commissioners, to shew that they had been appointed assignees, on which the plaintiff's counsel examined them, and raised an objection to the petitioning creditor's debt.

Per Cur.—He had no right to do so, the plaintiff having given no notice to the assignees, that he intended to dispute any of the proceedings under the commission.

BERNASCONI *v.* EARL OF GLENGALL, M. T. 1827. K. B. 1 M. & R. 326.

And no evidence will be received against the commission, and the recitals in it are conclusive as to the facts referred to*.

A COMMISSION stated, that A. and B., bankers, being traders according to the provisions of the 6 Geo. 4, c. 16, some time since became bankrupts within the intent and meaning of that statute.

The Court held, that a sufficient allegation that the bankrupts had traded, and had committed an act of bankruptcy, since the passing and within the operation of that statute; and also, that, in an action by assignees of a bankrupt, if the defendant does not give notice to dispute the trading, &c., he cannot dispute the validity of the commission itself; it is admitted.

See 8 Taunt. 730; S. C. 3 Moore, 58.

NEWPORT *v.* HOLLINGS, 1827. N. P. 3 C. & P. 223.

An assignee in fact, though not sued as assignee, need not, in trover against him, give evidence of the trading, &c., unless notice to dispute be given†.

TROVER against defendant, who was the assignee of a bankrupt. To support the defence, that the goods belonged to the former, the commission of bankrupt was put in, and the assignment to the defendant as assignee; it was objected, that the requisites to sustain the commission should be proved; but no notice to dispute having been given—

Vaughan, B., held not.

5. Effect of going into Evidence, instead of relying on the Depositions.

JOHNSON *v.* PIPER, M. T. 1833. K. B. 2 Nev. & M. 672.

If, after notice to dispute, evidence be gone into, instead of relying upon the depositions, it is no ground for setting aside a nonsuit.

NOTICE had been given by the defendant of his intention to dispute the trading, petitioning creditor's debt, and act of bankruptcy; but the bankrupt himself had not, within two calendar months after the adjudication, given notice of his intention to dispute the commission. The adjudication was on the 27th of March, the action was commenced by writ of summons on the 8th of June, and the cause was tried in July; so that more than two months had elapsed between the adjudication and any of the proceedings in this action.

* Nor is there any necessity for putting in the proceedings, as evidence, where there is no notice to dispute the commission. (2 G. & J. 245). For a demand for which the bankrupt might sue, the depositions are conclusive in an action by the assignees, unless the bankrupt, in due time, give notice of intention to dispute commission. (*Earith v. Schroder*, M. T. 1827, N. P., 1 M. & M. 24).

† Where the proceedings are produced to shew the appointment of the assignees, in the absence of notice to dispute, the party producing them cannot be examined with a view of impeaching the petitioning creditor's debt, &c. (*Macbeath v. Coates*, M. T., 1826, C. P., 4 Bing. 34; S. C. 12 Moore, 122; *Abr. ante*, p. 139).

The bankrupt was within the United Kingdom at the time of issuing the commission. The proceedings had been inrolled. The defendant, at the trial, called upon the plaintiff to prove the trading, &c. The plaintiff attempted to do so, but failed in proof as to the time down to which the bankrupt continued to trade. There was no evidence of a trading contemporaneous with the act of bankruptcy, and the plaintiffs were in consequence nonsuited.

The Court refused to set the nonsuit aside.

3.—Of Letters, Entries, &c., by Bankrupt, and of Admissions by his Attorney.

SMITH v. CRAMER, M. T. 1834. C. P. 1 *Bing. N. S.* 585; S. C. 1 *Scott*, 541.

AT the trial of this cause, the question was, whether Whalley had committed an act of bankruptcy on or before the 5th of March, 1834. Letters, written by the bankrupt to the holders of certain bills not then due, stating the deaths of the drawers, and asking further time, though written before the party absented himself from home, were adduced in evidence. It was objected, that the letters could not be received, they could not be considered as part of the *res gestæ*, inasmuch as they were written before the trader absented himself from his home.

Letters written by a trader a short time before his bankruptcy may be received in evidence, to shew his embarrassed circumstances.

Per Cur.—The letters may be received; they belong to that class of cases in which all that a man has said, or done, or written is declared to be admissible in evidence. On the 16th of January, he writes to the holders of two bills not then due, nor would they be so until March, and he tells them that the drawers of both bills are dead, and he asks further time. Now, was not this evidence to shew, from his conduct, that he was a needy man, and felt himself unable to meet the responsibility which he had assumed, and to discharge those obligations which were becoming due.

HAWKINS v. HOWARD, H. T. 1824. N. P. 1 *C. & P.* 222.

ACTION against defendant, (who had become bankrupt), as annuity broker, for laying out the money of the plaintiff on bad security.

Lord *Gifford* held, an entry in their ledger is evidence, though the witness who produces it did not make the entry, and the solicitor under their commission is compelled to produce the ledger containing the account between them and the person to whom they advanced the money, to shew that they knew him to be in an insolvent state.

An entry in the bankrupt's ledger is evidence, though the witness who produces it did not make the entry himself. *

PERRING v. TUCKER, M. T. 1829. C. P. 3 *M. & P.* 558.

IN an action by the assignees of a bankrupt certain admissions, on the part of the defendant, were put in; one of which was as follows:—

“ I, ———, the attorney for the above-named defendant, do

An admission by the bankrupt's attorney, that he was “ duly declared

* Extracts made from a party's books, by his consent, cannot be used as evidence against him, without also reading his examination which led to their being given. (*Yates v. Carnsew*, M. T. 1828, N. P., 3 *C. & P.* 99).

a bankrupt," is binding in an action by the assignees, unless notice to dispute has been given*.

hereby agree to admit, on the trial of this cause, as follows—That a commission of bankrupt, under the great seal of Great Britain, was *duly issued* against the said Martin Widger, bearing date the 21st day of June, 1823, under which he was *duly declared bankrupt*, and the plaintiffs were chosen assignees of his estate and effects; and that the assignment, and bargain and sale, and all the proceedings under the said commission, or any part thereof, may be read in evidence by the plaintiffs, on the trial of this cause, without further proof than is contained in the present admission."

The counsel for the defendant called on the other side to put in the proceedings under the commission.

Per Cur.—The words of the admission, that the party "was duly declared bankrupt," clearly include an admission of both law and fact, and put an end to the matter.

4.—Evidence in particular Cases.

YATES v. CARNSEW, M. T. 1828. 3 C. & P. 98.

Goods sold to a party, under circumstances which will enable the assignees to maintain trover for them, no demand and refusal need be proved†.

TROVER by the plaintiff's assignee; on the trial it was proved, that the defendant had purchased goods of the bankrupt with knowledge of the bankrupt's insolvency. On its being objected, that a demand and refusal should be proved—

Lord *Tenterden* said, the buying goods of a party who was not authorized to dispose of them, is enough to establish a conversion.

See 2 Stark. 306; 1 C. & P. 400.

STAFFORD v. CLARK, T. T. 1824. N. P. 1 C. & P. 403.

Admission by a defendant of the receipt of money after the act of bankruptcy, will not support the count as an account stated with the assignees.

THE declaration contained an account stated with the plaintiff as assignee. It was proved, that the defendant had admitted to a person who called upon him on behalf of the assignees, that he had received the bills and the 50*l.* from the bankrupt after the act of bankruptcy; but—

Best, C. J., ruled, that such an admission would not sustain the count as an account stated.

TUCKER v. BARROW, H. T. 1828. K. B. 7 B. & C. 623.

So, an admission by a party, that he received a sum of money after the bankruptcy, but not that it was a subsisting debt, is not evidence of an account stated with the assignees.

ACTION of assumpsit, in which the assignees of a bankrupt sought to recover a sum of money received by the defendant on account of the bankrupt, with knowledge of a previous act of bankruptcy, but which he claimed to retain for money due to him from the bankrupt. There was no count in the declaration for money had and received by the defendant to the use of the plaintiffs as assignees; but there was a count in an account stated between the defendant and the plaintiffs as assignees. To shew that the defendant had received the money in question, the plaintiffs put in an examination of the defendant, taken before the commissioners. In answer to questions put to him on the subject of this money, the defendant

* But see ante, p. 139.

† After assignees have shewn that property came to the defendant's hands after an act of bankruptcy, it is incumbent on defendant to shew the right to retain, and the plaintiffs are not bound to give credit on the ground of any supposed claims. (*Carter v. Barclay*, 1820, N. P., 3 Stark. 44).

admitted he had received it, after knowledge of the act of bankruptcy, and he gave the date of his receiving it.

The learned Judge, who tried the cause, was of opinion, that this was not evidence sufficient to maintain the count for an account stated with the assignees; and, as this was admitted by no other count upon which the plaintiffs could raise any argument in their favour, they were nonsuited; and the Court refused to interfere.

8th.—*Witnesses, Competency of.*

1. *Creditors generally.*

HALLEN v. HOMER, 1823. N. P. 1 C. & P. 108.

Park, J.—In all cases where the validity of a commission of bankruptcy is tried, every creditor of the estate is incompetent as a witness.

In action by assignees, a creditor cannot be admitted as a witness.

SINCLAIR v. STEVENSON, M. T. 1824. N. P. 1 C. & P. 582.

A CREDITOR appearing as a witness for the plaintiffs as assignees, he was, on being objected to, asked, whether he would release the estate on the plaintiff undertaking to pay him what should appear to be justly due to him; he replied in the affirmative. A release was then prepared, by which the witness, in consideration of a promise by them to pay him what should be found justly due, released all claims on the estate, and, in consideration of such release, made the promise required.

Unless he has released the assignees, on an undertaking by them to pay what is justly due.

Best, C. J.—He is a witness. By the claim of the assignee on the fund his interest is not affected. The assignee must pay the money whether he gets it again from the estate or not.

2. *Petitioning Creditor*.*

3. *Assignee†.*

4. *Bankrupt, and Declarations made by‡.*

CARLISLE v. EADY, H. T. 1824. N. P. 1 C. & P. 234.

ACTION by assignees of bankrupt. The latter was called to prove an acknowledgment of the debt by the defendant, and stated on the voir dire, that he had obtained his certificate, and released the estate. On its being suggested the release should be produced—

Park, J.—It is quite sufficient without the deed being called for. See *Ingram v. Dada*, cited 1 C. & P. 235, n.

After a bankrupt has stated on voir dire, that he has obtained his certificate, and released the assignees, he is a competent witness in an action by them.

* A petitioning creditor is, in general, incompetent to support the commission. (2 Camp. N. P. C. 410). But a petitioning creditor is a competent witness to defeat the commission. (1 Stark. N. P. C. 41).

† Declarations of a party, suing as assignee, made before his appointment, are not admissible against him. (*Fenwick v. Thornton*, H. T. 1827, N. P., 1 M. & M. 51). An assignee, who has released his claim on the bankrupt's estate, is a good witness to support a commission. (5 Moore, 172; S. C. 2 B. & B. 397).

‡ The bankrupt cannot prove the act of bankruptcy. (*Sanderson v. Laferest*, M. T. 1823, N. P., 1 C. & P. 46). The certificate and release must be produced, or non production accounted for, to make him a competent witness for the assignees. (*Best, C. J.*—*Goodhay v. Hendry*, H. T. 1829, N. P., M. & M. 319).

NEWMAN v. STRETCH, 1829. N. P. 1 M. & M. 338.

So, declarations by a bankrupt, at the time of his return, that he had quitted to avoid the service of the writ against him, are admissible *.

IN this case, the question was, whether declarations made by the bankrupt at the time of his return, that he had quitted to avoid the service of a writ were admissible against him.

The Judge held them admissible, and sufficient evidence of an act of bankruptcy, without further proof of the existence of the writ, or of the debt, or of there being any creditor.

BERNASCONI v. FAREBROTHER, E. T. 1832. K. B. 3 B. & Ad. 372.

And, in an action of trespass to try the validity of a joint commission, the declarations of one of the bankrupts are inadmissible.

TRESPASS against the sheriff and an execution creditor of A., by the assignees under a joint commission, against A. and B., the act of bankruptcy of B. being in dispute—

The Court held, that, as between the parties to the record, the declarations of one of the bankrupts were inadmissible in evidence, and as such objection might have been taken by a bill of exceptions, and, if allowed, a venire de novo would have sent the whole case again for trial, the Court could not, upon a motion for a new trial, limit the inquiry upon the new trial to one point.

BINNS v. TETLEY, T. T. 1825. Ex. 1 M. & Y. 397.

A bankrupt, who has been examined in chief to increase the funds, cannot be cross-examined to impeach,

IN trover by the assignees of a bankrupt for stuff goods, the bankrupt himself, who had released his interest in the bankruptcy funds to the assignee, was examined in chief by that party to prove the delivery of the stuffs. On cross-examination, having stated that he had suspended payment some time in February, 1824, and had about the same time given the plaintiff an order on the defendant for sixty-four pieces of stuff, which he had sold him, without then or since receiving any value for them, it was proposed to ask him (in substance), whether the act of bankruptcy was not collusive, and whether the petitioning creditor and assignee were not instrumental in effecting a fraudulent assignment. The tendency of that question being to defeat the commission, the learned Judge refused to let it be put, on the ground that the bankrupt was not a competent witness to support or impeach the commission, though a competent witness to increase the funds.

And the Court refused a new trial.

SAYER v. GARNETT, M. T. 1830. C. P. 4 M. & P. 734; S. C. 7 Bing. 103.

or defeat the commission.

THE act of bankruptcy relied upon on the part of the plaintiff was, that, on a particular day, the bankrupt had made an appointment to call on a creditor; and that he admitted to the witness that he had gone by a circuitous route for the purpose of avoiding the

* But declarations by bankrupt in the evening as to his absence in the morning are not admissible as part of the *res gestæ*. (*Lees v. Marton*, 1830, N. P., 1 M. & Rob. 210). So, declarations made by bankrupt after his bankruptcy are not admissible in evidence. (*Schooling v. Lee*, 1820, N. P., 3 Stark. 149). Statements made by a bankrupt before his bankruptcy are evidence in a question of reputed ownership. (*Sharpe v. Newsholme*, T. T. 1839, C. P., 8 Scott, 21).

plaintiff, as he was ashamed to see him, his affairs being in so bad a state. On the part of the defendant, it was proposed to call the bankrupt to explain this circumstance; but it was objected for the plaintiff, that, as the bankrupt could not be called to support the commission, so likewise he could not be called to impeach it.

Per Cur.—We think a bankrupt is not an admissible witness, either to support or to defeat his commission. It does not appear to us to be a necessary consequence of the bankrupt's not being permitted to be called to support the commission that he may be called to defeat it. On the one hand he has an interest in supporting the commission, in order to obtain his certificate. Has he not, on the other hand, an interest also in defeating it? Undoubtedly he would have an interest to defeat the commission, where it is his object and wish so to do.

5. Bankrupt's Wife or Children*.

WILLIAMS v. WILLIAMS, H. T. 1840. Ex. 8 D. P. C. 220.

IN an action by the assignees of a bankrupt to recover money paid to the defendant. The bankrupt had released the assignees, but had not obtained his certificate. The plaintiffs called the bankrupt's wife to prove the payment by her husband after his bankruptcy. It was objected by the defendant, that the wife was incompetent to prove that fact, on the ground that her husband, not having obtained his certificate, was interested in increasing his estate.

The assignees cannot call the wife of an uncertificated bankrupt to prove a payment to the defendant.

And of that opinion were the Court.

9th.—Defence to Actions by†.

10th.—Damages.

MOON v. RAPHAEL, M. T. 1835. C. P. 2 Bing. N. S. 310; S. C. 2 Scott, 489; S. C. 7 C. & P. 115.

THE plaintiffs, as assignees, sued the sheriff in trover for goods seized under a fi. fa. after the issuing of a fiat, and before plea the defendant delivered up the goods, which the plaintiff accepted, without imposing any condition, and proceeded in the action. A verdict passed for the plaintiffs, damages 60*l.*, being 40*l.* for additional rent, to which the plaintiffs alleged they were rendered liable by the conduct of the sheriff, and 20*l.* the expenses of the messenger. On motion to set the verdict aside, or reduce the damages to nominal—

Per Cur.—The rule for reducing the damages must be made absolute. Before the trial, the defendant, it appears, took a step

Where, in trover by the assignees against the sheriff for goods seized after the bankruptcy, the sheriff, before plea, delivered up the goods, but the action proceeded:—Held, that the plaintiffs were entitled only to nominal damages.

* In a Nisi Prius case it was doubted, whether a bankrupt's wife is competent to prove that a payment was made in contemplation of bankruptcy. (1 Esp. N. P. C. 67).

The bankrupt's son, apparently a partner, but not really so, is a competent witness for the assignees. (*Alderson, B.—Rolland v. Reeves*, H. T. 1835, N. P., 7 C. & P. 36).

† In an action by the assignees of a bankrupt, it is competent for a defendant to impeach the bankrupt's title, although he claims under him. (1 Stark. N. P. C. 175).

which he knew he could not justify, and he delivered the goods to the assignees. They thought proper to accept them; this they were not bound to do; they might have stood their ground, and gone on; and if the defendant had come to the Court to compel them to accept the goods, the Court would not have taken any proceeding for the purpose of thus compelling them, until they had ascertained that no injury had been done; they would have had the plight and condition of the goods investigated before they compelled the plaintiffs to take them. This is an ordinary action of trover, and the damages should be reduced to 1s.

11th.—Costs.

BUTLER v. HOBSON, M. T. 1838. C. P. 5 *Bing. N. S.* 128; S. C. 7 *D. P. C.* 157.

Where an assignee declared as such, but that was negatived:—

Held, that the defendant was entitled to the costs of proving a subsequent fiat.

IN trover by an assignee, upon the issue that the plaintiff was not possessed, &c., as assignee, it appearing that the plaintiff, being assignee under a second commission, had permitted the bankrupt to continue in the order and disposition of the goods, the defendant succeeded on that issue.

The Court held, that he was entitled to the costs of proving the third fiat, which was not a nullity, but not of proving the estate sufficient for payment of 15s. in the pound under the second commission; the 6 Geo. 4, c. 16, s. 127, extending only to the cases where the estate and effects existing at the date of the certificate were sufficient to produce that amount; which, unless that were the case, the subsequently acquired estate would vest in the assignees.

WORTH v. BUDD, E. T. 1831. K. B. 2 *B. & Ad.* 172.

The 6 Geo. 4, c. 16, s. 44*, does not entitle assignees and others acting in their aid to double costs when defendants.

AN action of trespass had been brought against the defendants, assignees of a bankrupt, and others acting in their aid. The validity of the commission being established, a verdict passed for the defendants; and the Court refusing to set it aside, a motion was made for double costs, pursuant to the 6 Geo. 4, c. 16, s. 44. For the plaintiff it was contended, that the cases of *Carruthers v. Payne*, (5 *Bing.* 270), and *Edge v. Parker*, (8 *B. & C.* 697), had decided, that the first part of the 44th section only applied to commissioners or persons discharging a public duty, and not to assignees.

And the Court said, if these decisions be law, there is no ground for saying that the latter part of the 44th section applies to different persons; and, therefore, we think the assignees are not entitled to double costs.

BARTHROP v. ANDERTON, H. T. 1832. C. P. 8 *Bing.* 268; S. C. 6 *M. & P.* 361; S. C. 1 *M. & Scott.* 361.

The costs of notice to dispute cannot be certified under

IN this cause notice had been given by the defendant to dispute the trading, the petitioning creditor's debt, and the act of bankruptcy. Upon the cause being opened, before *Parke, J.*, a reference

* By 47 Geo. 3, c. 121, 6 Geo. 4, c. 16, ss. 90, 91, where notice to dispute has been given, if the assignees prove the matter so disputed, the Judge may certify, and the assignees shall be entitled to costs occasioned by such notice. And the same rule obtains in equity.

was proposed by the defendant's counsel, which was agreed to on the part of the plaintiff, the defendant undertaking to admit, before the arbitrator, the petitioning creditor's debt, the trading, and act of bankruptcy.

Parke, J., having, on the ground of the before-mentioned admission, certified for costs for the plaintiff under 6 Geo. 4, c. 16, s. 90—

The Court, on motion to set aside the Judge's certificate, said, no words can be stronger than the 90th section of the 6 Geo. 4, c. 16, to shew that a discretionary power was intended to be vested in the Judge; and, unless he tries the whole cause, he cannot exercise that discretion properly. It has been argued, that, in this case, it is sufficient that the commission has been admitted. But cases may be supposed in which it would not be proper to give those costs, although the commission may have been admitted; for instance, where a defendant may have been deceived as to the act of bankruptcy, and, upon discovering his error in Court, at once makes the due admission.

6 Geo. 4, c. 16, s. 90, where the cause is referred, and not tried.

RALPHS v. DAWES, T. T. 1828. N. P. 3 C. & P. 362.

ACTION by assignees on a bill of exchange, due to the bankrupt before the bankruptcy. Notice to dispute had been given. The depositions were read to prove the trading, petitioning creditor's debt, and act of bankruptcy. On an application for a certificate for the costs of witnesses who attended to prove the bankruptcy—

Lord Tenterden said, that, as the 92nd section of 6 Geo. 4, c. 16, made the depositions evidence in suits by the assignees, for which the bankrupt might have sustained an action, they must refuse the certificate.

Where assignees sue for a debt for which the bankrupt might have sued, they cannot have a certificate for the costs of proving the petitioning creditor's debt, &c., the depositions being sufficient.

(k) SCIRE FACIAS BY.

FLETCHER v. POGSON, T. T. 1824. K. B. 5 D. & R. 1; S. C. 3 B. & C. 192.

DECLARATION in sci. fa. on a bail recognizance, by assignees of the original plaintiff, become bankrupt, only stated their having been chosen assignees, and that "on behalf of plaintiff as assignees aforesaid," &c., to which the defendant pleaded no ca. sa. duly issued and returned against the principal defendant. On demurrer—

Per Cur.—Having pleaded over, the defendants could not avail themselves of the objections that no title in the plaintiff as assignees was shewn; and the expression "as assignees as aforesaid," being capable of the meaning, "assignees of the bankrupt's estate," and not having been demurred to as equivocal, the Court would put that construction on it to support the sci. fa. If the declaration had been specially demurred to, it would have been bad, as not shewing clearly more than an incipient title to be perfected by an assignment.

A scire facias by assignees, that a commission was duly issued against A., and that they were duly chosen assignees of the estate and effects of A., discloses a sufficient title to sue, unless upon special demurrer.

(l) EXTENTS CONNECTED WITH.

REX v. WINKLES, M. T. 1824. Ex. 1 M. & Y. 33.

PROPERTY and books of account had been seized under an immediate extent in chief, issued against a collector of taxes and his

On an issue between the as-

signees and the Crown, under an extent, the assignees are entitled to inspect the bankrupt's books.

partner in trade, for a debt to the Crown, and a claim had been entered by the assignees of the defendants, who had become bankrupts.

The Court held, that the assignees were entitled to an inspection and copies, &c., of the books, previous to the trial of the issue between them and the Crown.

(m) ACTIONS AGAINST.

BERESFORD *v.* BIRCH, T. T. 1824. N. P. 1 C. & P. 373.

The 20*l.* per cent. recoverable against assignees for retaining balance, cannot be recovered under the common counts*.

ACTION for money had and received, and on an account stated. The plaintiff claimed a sum as for interest, at the rate of 20*l.* per cent. under 49 Geo. 4, c. 121, s. 4, against the defendant for balance retained by him as assignee.

Abbott, C. J., said, this interest, at 20*l.* per cent., is in the nature of a penalty; and, I think, you must declare specially, as for a penalty. If the commissioners had settled an account, and charged the defendant with such interest, then the case would have been different.

THOMPSON *v.* BRADBURY, M. T. 1834. C. P. 3 D. P. C. 147; S. C. 1 *Bing. N. S.* 327; S. C. 1 *Scott*, 279.

Where the landlord sues the assignees for rent, they may plead, that the term did not vest in them, and that they abandoned it.

IN covenant for rent by lessor against assignees of the lessor, become bankrupt, the Court allowed the pleas; first, that all the lessee's interest did not pass to the defendants; and, secondly, that they had renounced and abandoned the term, so as to be discharged from liability on the covenants.

GILES *v.* SMITH, M. T. 1834. Ex. 1 C., M. & R. 462.

In an action by the bankrupt against his assignees, to try validity of the commission, parol evidence of the assignment may be

IN an action by a bankrupt against his assignees to try the validity of his commission. The defendant proved his title as assignee in the usual manner, with the exception that he did not produce either the commission or the assignment; both those documents being proved to have been lost in the course of certain proceedings which had taken place in the Court of Review. To supply this defect, the defendant gave in evidence a copy of the commission, which

* After an order of dividend, if the assignee retains in his hands the sums which ought to have been paid to several creditors, his assets cannot, after his death, be charged with interest at the rate of 20*l.* per cent. on the sums so misapplied by him. (*Wackerbath v. Powell*, 2 G. & J. 151). If a creditor, not being cognizant of his right to set off, pays money to the assignee of a bankrupt, he may recover it back from the latter. (1 Term Rep. 285). And where a bankrupt carried on the business for the benefit of his creditors, as their agent, under the authority of the assignee, and ordered goods in his own name, which were used in the business, the assignees were holden liable. (2 Stark. N. P. C. 355). A. was employed to engrave plates from drawings; he accordingly took off the plates so engraved by him several proof impressions for his own use; subsequently he became bankrupt; his assignees sold the impressions:—Held, that the assignees were not liable under the 17 Geo. 3, c. 57, for selling pirated prints. (*Murray v. Heath*, H. T. 1831, K. B., 1 B. & Ad. 804; Abr. post, tit. *Copyright*).

In an action against assignees of a bankrupt, it is no ground to put off the trial, that the bankrupt is an important witness, that a sufficient number of creditors have signed his certificate; but it has not been allowed by the Chancellor, so as to make him competent to be examined. (Lord Tenterden, C. J.—*Tenant v. Strachan*, T. T. 1829, N. P., 4 C. & P. 31).

had been entered of record, and a counterpart of the assignment, which had been entered of record, the assignment itself having been lost before it was entered of record.

given, if lost before enrolment.

Per Cur.—We think, as the assignment was lost before it was entered of record, pursuant to the 6 Geo. 4, c. 16, secondary evidence of its contents may be received.

CHAMBERS v. BERNASCONI, T. T. 1834. Ex. Chamb. 1 C. M. & R. 347.

IN an action by a bankrupt against his assignees, to try the validity of the commission, the depositions of deceased witnesses, taken before the commissioners on the opening of the commission, and inrolled by the assignees according to 6 Geo. 4, c. 16, s. 96, are not evidence against the assignees.

But depositions taken before commissioners of a deceased witness are not evidence.

XVIII. OF MUTUAL CREDIT AND SET-OFF*.

(a) OF MUTUAL CREDIT.

ROSE v. SIMS, M. T. 1830. K. B. 1 B. & Ad. 521.

A TRADER made an agreement with another person, part of which was, that the trader should give his acceptance, and receive from the other an acceptance of a third person, duly indorsed. The trader gave his acceptance; but it was dishonoured when due. The other person delivered over the bill agreed for, but refused to indorse it. In an action by the assignees of the trader, on his becoming bankrupt, for breach of the agreement in not indorsing the bill—

Mutual credit does not exist between the bankrupt and other parties, under 6 Geo. 4, c. 16, s. 50, where there is not an actual debt, or something which must end in a debt.

Per Cur.—This is not a case of mutual credit within the 6 Geo. 4, c. 16, s. 50, so as to let in a set-off by the defendant.

See 4 T. R. 24; 7 Id. 378; 4 Ves. 177.

COLLINS v. JONES, E. T. 1830. K. B. 10 B. & C. 777.

IN this case, the defendant, the maker of a note, which had been discounted by a party, since become bankrupt, had received, in part, the acceptance of the latter.

But a mutual debt may exist although the security creating it be, at the time of the bankruptcy, in the hands of a third party.

The Court held, that if it at the time constituted a mutual credit between them, it was not extinguished by the circumstance of the latter bill, at the time of the bankruptcy, not being in the defendant's hands, but of a party to whom he had paid it, and by whom he was compelled to take it up.

See 8 B. & C. 105.

* By 6 Geo. 4, c. 15, s. 50, it is enacted, "That where there has been a mutual credit given by the bankrupt and any other person, or where there are mutual debts between the bankrupt and any other person, the commissioners shall state the account between them, and one debt or demand may be set against another, notwithstanding any prior act of bankruptcy committed by such bankrupt before the credit given to, or the debt contracted by, him, and what shall appear due on either side on the balance of such account, and no more, shall be claimed or paid on either side respectively, and every debt or demand hereby made proveable against the estate of the bankrupt, may also be set off in manner aforesaid against such estate; provided that the person claiming the benefit of such set-off had not, when such credit was given, notice of an act of bankruptcy by such bankrupt committed."

HULME v. MUGLESTON, M. T. 1837. Ex. 3 M. & W. 28; S. C. 6 D. P. C. 112.

So, a mutual credit may arise out of a prospective liability, and cannot be defeated by the assignees putting in issue the legality of the debt by their replication.

ASSUMPSIT by assignees of S., a bankrupt, for money had and received since the bankruptcy. Plea, that, before the bankruptcy, defendant gave credit to S., by indorsing for his accommodation, and without consideration, a bill of exchange drawn by him, and that such credit was likely to end in a debt. Averment, that the amount of the bill was paid by the defendant on its dishonour after the bankruptcy, and before the commencement of the action, and that S. thereupon became indebted to the defendant. That, before the bankruptcy, S. drew a bill of exchange on C. Bank, and delivered it to defendant by way of loan, that he might raise the amount, and thereby gave credit to the defendant to that amount; and that afterwards, before the bankruptcy, the defendant obtained the amount of the said bill from C. Bank, and is ready and willing to set off the two sums against each other. The plaintiff replied, that defendant did not give credit to S., and that S. did not give credit to defendant, and that S. was not, nor is, indebted to defendant, *modo et formâ*. On special demurrer—

The Court held, that the plaintiffs could not, by their replication, put in issue the legality of the debt.

(b) OF SET-OFF.

LACKINGTON v. COMBES, M. T. 1839. C. P. 6 Bing. N. S. 71.

To constitute a set-off, there must be a *bonâ fide* debt*.

IN an action by assignees of a bankrupt for goods sold, the defendant pleaded a set-off in respect of a bill drawn by H. on the bankrupt, and accepted by him, and indorsed by H. to the defendant. The plaintiffs replied, that it was indorsed by H. after dishonour, and without consideration, for the purpose of being given for the price of the goods to be bought and handed over to H., and set off against that claim.

Per Cur.—The transaction does not create a debt within the 6 Geo. 4, c. 16, which intended *bonâ fide* debts; and the replication is, therefore, an answer to the plea.

GROOM v. WEST, M. T. 1838. Q. B. 1 P. & D. 19; S. C. 8 Ad. & E. 481.

To assumpsit for damages occasioned by non-acceptance of goods,

To an action of assumpsit, by assignees, on an agreement by the bankrupt for the sale of goods, to be paid for by an acceptance, alleging the refusal to accept, and damage by loss of the benefit of such acceptance, and injury to his estate thereby—

The Court held, that the damage resulting in pecuniary loss only, it did not amount to such an allegation of unliquidated damages as to preclude the debtor's right of a set-off.

See *Gibson v. Bell*, 1 Bing. N. S. 743; S. C. 1 Scott, 712.

* The Court took time to consider, whether the assignees of a party, who had become bankrupt, can recover a debt due from the defendant, if the bankrupt, before his bankruptcy, agreed to set it off against a debt that he owed the defendant's brother, there being no memorandum in writing. (*Cuxen v. Chadley*, M. T. 1824, N. P., 1 C. & P. 485).

GIBSON *v.* BELL, M. T. 1833. C. P. 1 *Bing. N. S.* 743; S. C. 1 *Scott*, 712.

IN an action by the assignees for not accepting a bill in payment of goods sold and delivered by the bankrupt pursuant to agreement—

The Court held, that the defendant was entitled to set off a claim for money lent, &c., as the plaintiff's claim could terminate in a debt only, and nothing else.

or for not accepting a bill in payment of goods, the defendant may plead a set-off.

McGILLIVRAY *v.* SIMSON, M. T. 1826. K. B. 9 *D. & R.* 35; S. C. 2 *C. & P.* 320.

THIS was an action of assumpsit by the assignees of a bankrupt against the defendant, a broker, who pleaded a set-off; to which the plaintiffs replied, that he agreed not to set off the previous debt.

But the Court held, that the broker was entitled, under the equity of the Bankrupt Act, to set off his claim, and insist upon his lien for commission against the assignees, notwithstanding an express agreement by him to pay over the whole proceeds.

See 1 *East*, 375; 1 *Atk.* 230; 2 *M. & S.* 510; 1 *Bing.* 31.

HAWKINS *v.* WHITTEN, M. T. 1830. K. B. 10 *B. & C.* 217; S. C. 5 *M. & R.* 219.

THIS was an action by the assignees of Morton & Co., bankrupts, for money due from the defendant to the bankrupts. The defendant gave notice of a set-off. It appeared that Morton & Co. carried on business as bankers at Wellingborough. The debt due from the defendant to them was not disputed. The question was, whether he was entitled to a set-off in respect of notes of the Wellingborough bank of Morton & Co., and which he had gotten into his possession at the time, and under the circumstances following:—On the 14th of December, the bankers had stopped payment, and shut up their house. The defendant was a printer, and employed by them to print the following notice, which was afterwards circulated:—"Messrs. Morton, Rodick & Co. hereby give notice, that, owing to the alarming state of money matters in London, their agents cannot possibly remit them the funds which are in their hands: they are, therefore, under the painful necessity of suspending their payments for a short time." On the 16th of December, the defendant got into his hands notes of Morton & Co. to the amount of 65*l.*; and it came out, on the cross-examination of his witnesses, that he had exerted himself to obtain them. The commission against Morton & Co. was issued some time afterwards.

A broker may set off his claims, and insist upon his lien for commission against the assignees, notwithstanding an express agreement by him to pay over the whole proceeds.*

Where country bankers become bankrupt, and a debtor obtained their notes, after notice of the bank having stopped payment, but without notice of the act of bankruptcy, he was held entitled to set off the notes against his debt to the estate.

Per Cur.—The provision as to the right of set-off against a bankrupt's estate has varied much. The 5 Geo. 2, c. 30, gave the right of set-off if the credits were given, or the debts incurred, before the person became bankrupt; the 46 Geo. 3, c. 135, extended this right to cases where the credit was given to the bankrupt two calendar months before the commission, provided the person giving the credit had not notice of any prior act of bankruptcy, or that the person was insolvent, or had stopped payment. The 6 Geo. 4, c. 16, still further extending the right, takes away the last-mentioned limitation, and gives the right in all cases where there was no notice of a prior act of bankruptcy. Notice of an act of bankruptcy is now the

* See post, p. 154.

criterion by which the right is to be allowed or disallowed; and although the defendant may have taken the bankrupt's notes, in the present case, after the stoppage, for the very purpose of setting them off against the debt he owed them, he is not fixed by the evidence with knowledge of a prior act of bankruptcy; and we cannot, therefore, say that his conduct was illegal.

DICKSON *v.* CASS, T. T. 1830. K. B. 1 *B. & Ad.* 343.

Notes taken by defendant, without proof of an act of bankruptcy, but pending a run on a bank, may be set off.

THE defendants, pending a run upon bankers and supposed insolvency, but, before knowing of any act of bankruptcy, took the notes issued by them.

The Court held, that they were entitled to deduct them from the claim of the assignees made upon the defendants in respect of advances, &c.; but not in respect of such notes as they had received after knowledge of acts of bankruptcy committed by three out of four of the bankrupts, although followed by a joint commission, the words of the provision in section 82 of the 6 Geo. 4, c. 16, must be construed, "notice of an act of bankruptcy by any of the bankrupts committed."

BOLLAND *v.* NASH, E. T. 1828. K. B. 8 *B. & C.* 105; S. C. 2 *M. & R.* 189.

Where the discount of a bill pays it away and becomes bankrupt, and his assignees have to allow the amount in account with a third party after the bankruptcy, the person for whom it was discounted is entitled to his right of set-off upon the general account between him and the bankrupt.

A. ACCEPTED bills drawn by B., his banker, who discounted the bills and indorsed them for value to C. B. became bankrupt before the bills were due, having, in the hands of C., money more than sufficient to cover the bills, and having in his own hands money of A.; C. presented the bills, when due, to A. for payment, which was refused; whereupon he paid himself out of the money of B. in his hands, and gave up the bills to B.'s assignees. In an action by B.'s assignees against A. upon the bills—

Held, that there was a mutual credit between A. and B. before the bankruptcy of the latter, and that A. might set off against the claim of B.'s assignees, in respect of the bills, the sum due to him from B. at the time of his bankruptcy.

KNOWLES *v.* MAITLAND, E. T. 1825. K. B. 4 *B. & C.* 173; S. C. 6 *D. & R.* 312.

Monies received by a regimental agent, who becomes bankrupt, from the colonel, may be set off against a demand of the assignees by the agent.

A COLONEL of a regiment, after being indebted to the army-agent for clothing furnished to the regiment, appointed him his lawful agent, and authorized him to receive from the paymaster-general all sums due to the regiment. The agent, after receiving several sums, became bankrupt. In an action, by his assignees against the colonel, for the sum due for clothing—

It was holden, that the colonel might set off the sums received by the agent from the paymaster.

KINDER *v.* BUTTERWORTH, M. T. 1826. K. B. 6 *B. & C.* 42; S. C. 9 *D. & R.* 47.

Prior to the 6 Geo. 4, c. 16, assignees would have deprived a debtor of his

DEALINGS between a trader and his factor, continued after the former had committed an act of bankruptcy, and up to the time of issuing a commission. On the questions whether the assignees of the bankrupt might recover from the factor all sums of money re-

ceived by him from the bankrupt within two months before the issuing of the commission, and whether the latter could set off debts incurred by the bankrupt to him during that period, although he did not know of the act of bankruptcy:—

The Court held—1st, Under commissions prior to 6 Geo. 4, c. 16, the assignees are entitled to deprive a debtor of his set-off, in respect of all transactions within two months of the commission. In such cases they might, therefore, take only one side of the account against the debtor; and leave him to come in as a creditor as to the items on the other side. 2nd, But, by 6 Geo. 4, c. 16, s. 50, the mode of taking the account is altered, and the two sides are fairly placed against each other up to the time of the commission, and the balance struck accordingly; provided the party dealing with the bankrupt had no notice of a prior act of bankruptcy.

set-off in respect of all transactions within two months of the commission; but since that act, the two sides of the account are to be placed against each other, and the balance struck, unless the party dealing with the bankrupt had notice of a prior act of bankruptcy.

DEAN *v.* M'GHIE, T. T. 1826. N. P. 2 C. & P. 387; S. C. 12 Moore, 185; S. C. 4 Bing. 45.

THE owner of a ship at sea mortgaged her by bill of sale, and the mortgagee took possession on her homeward voyage, and before she arrived in port received sums on account of freight; and paid seamen's wages and port charges, exceeding in amount what he had received for freight. The mortgagor became bankrupt, and, in an action by the assignees for the freight—

Best, C. J., directed a nonsuit; for the bill of sale conveyed to the mortgagee a title to the freight as well as to the ship itself; and by taking possession he had a right to the profits to be derived from payment of the freight on the one hand, and was liable to discharge the necessary disbursements of the ship on the other.

The assignees of the mortgagor of a ship at sea cannot maintain an action against the mortgagee for money received as freight, where a sum of money equal in amount has been applied by him to the payment of seamen's wages.

HAYLLAR *v.* SHERWOOD, M. T. 1833. K. B. 2 N. & M. 401.

THE plaintiff, at the time of the sale of a horse to the defendant, was an uncertificated bankrupt; being indebted at the time to the defendant, but which might have been proved under his commission, and before action brought, he obtained his certificate.

The Court held, that his assignees not interfering, he was entitled to recover, and that the defendant could not set off a debt then barred by the certificate.

But a debt barred by the certificate cannot be set off.

WEST *v.* PRYCE, E. T. 1825. C. P. 2 Bing. 455; S. C. 10 Moore, 154.

A. B. BROUGHT an action against C. D. to recover the price of a horse sold by the former to the latter; and A. B. was afterwards declared a bankrupt; after which C. D. obtained judgment as in case of a nonsuit; and the assignees of A. B. afterwards sued C. D. for the same cause of action, and obtained a verdict:—

Held, that the costs in the former action could not be set off against the damages and costs of the latter, the Court observing, that the damages and costs in the last action clearly belong to the plaintiffs as assignees. How, therefore, can we allow the defendant to deduct the costs of the nonsuit in the former action on a motion of this description? It can never be granted but in cases where the party's interests are the same.

See *The King v. Davis*, 9 East, 318.

So, costs of judgment, in the case of a nonsuit against a bankrupt, cannot be set off in an action brought by the assignees in relation to the same subject.

BUCHANAN *v.* FINDLEY, T. T. 1829. K. B. 4 *M. & R.* 593.

A. directs the proceeds of bills to be appropriated by B. before they fall due; A. becomes bankrupt; B. receives the money. B. cannot set off so as to retain the proceeds.

IN assumpsit for money had and received to the use of the plaintiffs, as assignees of A. & Co., being the proceeds of a bill remitted to the defendants, with orders to get it discounted and apply the proceeds in a specific way; but before they became due, A. & Co. became bankrupt, and required to have the bill returned, it not having been discounted; but the defendants received the amount when due.

Per Cur.—The assignees are entitled to recover; and that the defendants cannot set off a debt due to them from the bankrupt under such circumstances.

BELCHER *v.* LLOYD, M. T. 1833. C. P. 10-Bing. 310; S. C. 3 *M. & Scott*, 822.

Where a particular bill of exchange is treated by a tradesman as settled, he cannot afterwards say it is unsettled, in order to make it the subject of a set-off, on a subsequent bankruptcy of one of the parties.

A. AND B., bankers in Scotland, issuing bank notes, and having agents in London respectively; in the course of business the bankers interchanged their notes at stated periods, and he in whose favour the balance was received a draft at ten days upon the London agent. Upon the 24th of December, 1831, an interchange of notes took place between the two houses, when a balance was found in favour of the defendant of 760*l.*, for which he received a bill in London at ten days, and which he indorsed to the defendants, to become due on the 6th of January. On the 30th of December, a similar interchange took place, when a balance of 100*l.* was in favour of B., for which he received the usual bill on the defendants, to become due on the 12th of January. Upon the 2nd of January, B. stops payment and is bankrupt; his bill for 760*l.*, of which the defendants were the holders and indorsees, was presented on the 6th and dishonoured. The defendants, on the next day, the 7th, return the bill to their indorsers, under protest, with a receipt, and appropriate to its discharge a certain portion of the cash balance of the indorsers in their hands. The latter, upon the 10th of January, return the bill to the defendants for the purpose of having it set off by them against the acceptance of the 100*l.*, to fall due on the 12th of January.

Per Cur.—The defendants had no such right of set-off, inasmuch as they, by returning the bill on the 7th, under protest, with a receipt, and by the appropriation of other funds to its discharge, had ceased to be its legal owners; that they held it merely as trustees for the indorsers, and that the transaction as to the bill between the defendants and the indorsers was closed.

CLARKE *v.* FELL, H. T. 1833. K. B. 4 *B. & Ad.* 404; S. C. 1 *N. & M.* 244.

The right to set-off under the 6 Geo. 4, c. 16, may be waived by an agreement prior to the bankruptcy that there was to be no set-off*.

THE plaintiff sent to A. a stanhope to be repaired, at the time the plaintiff held an overdue bill of exchange of A.'s. After the stanhope was repaired, but before it was sent home, A. became bankrupt; the assignees refused to give it. In trover, the assignees proved, there could be no set-off as claimed by the plaintiff under the 6 Geo. 4, c. 16, because there was an agreement between A. and the plaintiff, that A. was to be paid in ready money.

Denman, C. J., told the jury, if they thought the agreement proved, they would find for the defendant. The jury found for the defendant, and the Court refused a new trial.

* See ante, p. 151.

XIX. OF THE DIVIDEND.

- (a) PROCEEDINGS PREPARATORY TO DECLARING THE DIVIDEND*.
- (b) MODE OF DECLARING THE DIVIDEND †.
- (c) MODE OF COMPELLING PAYMENT ‡.

(d) OF UNCLAIMED DIVIDENDS.

By 5 & 6 Will. 4, c. 29, s. 5, "Whereas, by an act passed in the sixth year of the reign of his late Majesty, King George the Fourth, intituled, 'An Act to amend the Laws relating to Bankrupts,' it is amongst other things enacted, that the assignees shall file a certificate in the office of the Lord Chancellor's secretary of bankrupts, containing an account of the names of creditors to whom unclaimed dividends are due, and of the amount of such dividends, and power

5 & 6 Will. 4, repeals 6 Geo. 4, so far as relates to filing the certificate and investment of unclaimed dividends.

* By the 5 Geo. 2, c. 30, s. 33, and 6 Geo. 4, c. 16, s. 107, the commissioners are directed not sooner than four, nor later than twelve calendar months, from the issuing of the commission, to appoint a public meeting, whereof they shall give twenty-one days' notice in the London Gazette, to make a dividend.

† *Of the First Dividend.*—By the 5 Geo. 2, c. 30, s. 33, and the 6 Geo. 4, c. 16, s. 107, the commissioners are directed at a meeting for the dividend, to order such part of the net produce of the bankrupt's estate in the hands of the assignees, as they shall think fit, to be forthwith divided amongst such creditors as have proved debts under the commission in proportion to their respective debts, and shall make an order for a dividend in writing under their hands, and shall cause one part of such order to be filed amongst the proceedings under the commission, and shall deliver another part thereof to the assignees, which order shall contain an account of the time and place of making such order, of the amount of the debts proved, of the money remaining in the hands of the assignees to be divided, of how much in the pound is then ordered to be paid to every creditor, and of the money allowed by the commissioners to be retained by the assignees, with their reasons for allowing the same to be so retained; and the assignees, in pursuance of such order, (and without any deed of distribution made for that purpose), shall forthwith make such dividend, and shall take receipts, in a book to be kept for that purpose, from each creditor for the dividend received by such creditor; and such order and receipt shall be a discharge to every such assignee for so much as he shall pay pursuant to such order.

Of the Second or Final Dividend.—By the 5 Geo. 2, c. 30, s. 37, and the 6 Geo. 4, c. 16, s. 109, it is enacted, "That if the bankrupt's estate shall not have been wholly divided upon the first dividend, the commissioners shall, within eighteen calendar months after the issuing of the commission, appoint a public meeting, (whereof and of the purport whereof they shall give twenty-one days' notice in the London Gazette), to make a second dividend of the bankrupt's estate, when all creditors who have not proved their debts, may prove the same; and the commissioners at such meeting, after taking such audit as hereinbefore directed, shall order the balance in the hands of the assignees to be forthwith divided amongst such of the creditors as shall have proved their debts, and such second dividend shall be final, unless any action at law or suit in equity be depending, or any part of the estate be standing out not sold or disposed of, or unless some other estate or effects of the bankrupt shall afterwards come to the assignees, in which case they shall, as soon as may be, convert such estate and effects into money, and, within two calendar months after the same shall be so converted, divide the same in manner aforesaid."

‡ By the 49 Geo. 3, c. 121, s. 12, and 6 Geo. 4, c. 16, s. 111, it is enacted, "That no action for any dividend shall be brought against the assignees by any creditor who shall have proved under the commission; but, if the assignees shall refuse to pay any such dividend, the Lord Chancellor may on petition order payment thereof, with interest, for the time that it shall have been withheld, and the costs of the application."

is thereby given for the investment of such dividends; and, after the expiration of three years, the Lord Chancellor is empowered to order the same to be divided amongst and paid to the other creditors in manner therein mentioned; be it enacted, that so much of the said act as directs the filing of the said certificate, and the investment, division, and payment of 'such unclaimed dividends,' be and the same is hereby repealed."

Unclaimed dividends are to be paid into the Bank.

By sect. 6, it is enacted, "That all dividends unclaimed as hereinafter mentioned, and also any undivided surplus of a bankrupt's estate, over and above the amount finally directed to be divided amongst the creditors of any bankrupt, shall be paid into the Bank of England to the credit of the accountant-general of the High Court of Chancery, or of the accountant in bankruptcy, when such last-mentioned officer shall have been appointed, to be carried to an account to be intituled 'The Unclaimed Dividend Account,' subject to the order of the Lord High Chancellor, or of the Court of Review in bankruptcy, or of any commissioner of the said court, for the payment thereof of any dividend or dividends due to any creditor or creditors, and subject also to the order of the Lord Chancellor, for the laying out and investment thereof in the purchase of government or parliamentary securities, which securities shall be carried to the before-mentioned account, to be intituled 'The Bankruptcy Fund Account,' and shall be subject to such rules and regulations as the said Lord Chancellor shall direct: provided always, that any order of any commissioner for payment of any dividend under the provisions aforesaid, shall be subject to appeal to the said Court of Review."

And to be paid to the creditors, or such persons as are entitled to them.

By sect. 7, it is enacted, "That if any assignee under any commission of bankrupt, or fiat in bankruptcy, now issued, or hereafter to be issued, shall have, either in his own hands, or at any bankers, or otherwise subject to his order or disposition, or shall know that there is or are in the hands, or subject to the order and disposition of himself, and any co-assignee or co-assignees, or of any or either of them, any unclaimed dividend or dividends, amounting in the whole to the sum of 20*l.*, or any such undivided surplus as aforesaid, amounting to the sum of 20*l.*, such assignee shall, as to any such now existing unclaimed dividend or dividends, within one year after the passing of this act, and as to any future dividend or dividends, within three calendar months next after the expiration of one year from the time of the declaration and order of payment of such future dividend or dividends, either pay the same to the creditor or creditors, or other the person or persons entitled to the same respectively, or cause a certificate thereof respectively to be filed in the office of the Lord Chancellor's secretary of bankrupts, containing a full and true account of the name or names of the creditor or creditors to whom such unclaimed dividend or dividends is or are respectively due, and of the amount of such dividend or dividends respectively; and shall in like manner as to any such now existing undivided surplus as aforesaid within one year after the passing of this act, and as to any such future undivided surplus as aforesaid within three calendar months next after the expiration of one year after the final declaration of dividends, cause a certificate, stating the full and true amount of such surplus, to be filed in the office of the said secretary of bankrupts; and every certificate to be filed as aforesaid shall be signed by the assignee or assignees filing the same; and every

assignee who shall, according to the provisions of this act, be bound to file such certificate as aforesaid, and who shall make default in filing the same, shall be charged, in account with the estate of the bankrupt, with interest upon the amount of such unclaimed dividend or dividends, or undivided surplus as aforesaid, to be computed from the time at which such certificate is hereby required to be filed, at the rate of 5*l.* per centum per annum, for such time as he shall thenceforth, either solely or together with any co-assignee or co-assignees, or other person or persons, retain such dividend or dividends or undivided surplus, as the case may be, and also with such further sum as the Lord Chancellor or the Court of Review shall direct, not exceeding in the whole at the rate of 20*l.* per centum per annum, to be computed from the time aforesaid; and every assignee shall, within one year next after the filing of any such certificate as aforesaid, pay or cause to be paid into the Bank of England, in the name of the accountant-general of the High Court of Chancery, or of the accountant in bankruptcy, when such last-mentioned officer shall have been appointed, to be carried to the said account, to be intituled, 'The Unclaimed Dividend Account,' the full amount of the unclaimed dividends mentioned in such certificate, or so much thereof as shall not have been then paid to the creditor or creditors, or other person or persons entitled thereto, and also the full amount of such undivided surplus as aforesaid; and if any assignee shall make default in such payment, it shall be lawful for the Lord Chancellor or the said Court of Review, on petition or otherwise, to order that such sum or sums be forthwith paid into the Bank of England in manner aforesaid, together with such further sum to be charged on such assignee or assignees, or other party or parties personally, as to the said Lord Chancellor or to the said Court may seem fit, not exceeding at and after the rate of 20*l.* per centum per annum on the sum or sums so withheld, to be computed from the filing of such certificate up to the time of payment of such sum or sums, and also to make such further order as to costs as the justice of the case shall seem to require: provided always, that no such certificate as aforesaid of any unclaimed dividend or dividends shall be filed until the expiration of one year after the declaration and order for payment of such dividend or dividends."

By sect. 8, it is enacted, "That the said accountant-general in Chancery, or the said accountant in bankruptcy, as the case may be, shall, on the application of any assignee or assignees, give to him or them a certificate or certificates stating the amount of any sum or sums of money which he or they may be desirous of paying into the Bank of England under the provisions aforesaid: and, on the production of such last-mentioned certificate or certificates, the Governor and Company of the Bank of England shall receive the sum or sums therein mentioned, and give a receipt or receipts for the same, and shall forthwith carry the same to the credit of the said accountant-general in the account in bankruptcy, as the case may be, to the said account, intituled 'The Unclaimed Dividend Account;' and every such certificate and receipt shall be given without fee or reward."

And the assignees are to have a certificate of the receipt of such dividends from the Bank.

XX. OF THE BANKRUPT'S ALLOWANCE*.

XXI. OF THE SURPLUS†.

XXII. OF THE SUPERSEDEAS‡.

If the fiat be disputed before supersedeas, an issue may be tried with respect to any matter of fact, if desired by the bankrupt, who can find security for costs, &c.

By 1 & 2 Will. 4, c. 56, s. 17, it is enacted, "That if any trader adjudged bankrupt shall be minded to dispute such adjudication, and shall present a petition praying the reversal thereof to the said Court of Review, such petition to be presented within two calendar months from the date of such adjudication, if such trader shall be then residing within the United Kingdom; or within three calendar months from the date aforesaid, if then residing in any other part of Europe; or within one year from the date aforesaid, if then residing elsewhere, or within such other time as the said Court shall allow, (not exceeding one year, to be computed from the date aforesaid), such Court of Review shall proceed to hear and decide on the said petition; or, at the option of the said bankrupt, and on his finding such security

* By 6 Geo. 4, c. 16, s. 114, "It shall be lawful for the commissioners, before the choice of assignees, and after such choice, for the assignees, with the approbation of the commissioners, testified in writing under their hands, from time to time to make such allowance to the bankrupt out of his estate, until he shall have passed his last examination, as shall be necessary for the support of himself and his family." By 5 Geo. 2, c. 30, s. 7, "The bankrupt, after his estate has paid 10s. in the pound, is entitled to an allowance of 5l. per cent., provided such allowance does not exceed 200l. And if his estate pays 12s. 6d., then he is to have 7½ per cent., provided it does not exceed 250l. And if his estate pays 15s. in the pound, he is to have 10l. per cent., provided it does not exceed 300l. And if his estate does not pay 10s. in the pound, the commissioners may make him an allowance, so as it does not exceed 3l. per cent." And now, by the 6 Geo. 4, c. 16, the amount is doubled.

† By 5 Eliz. c. 13, s. 4, 1 Jac. 1, c. 15, and 6 Geo. 4, c. 16, s. 132, the assignees must account with the bankrupt, and pay him the surplus after the creditors have received interest upon their debts. Formerly, in a case of surplus coming to a bankrupt, creditors had a right to interest only where there was a contract for it appearing on the face of the security or established by evidence; (2 Ves. jun. 295; 11 Ves. 654; 14 Ves. 573; 1 Ves. jun. 170; 1 Atk. 75; 3 Bro. 346; 7 Ves. 132); or where by the course of trading and settling accounts interest was allowed after the expiration of a certain credit; (3 Bro. 436; 3 Bro. 504; 1 Ves. 302; 1 Rose, 399; 1 V. & B. 342; 1 Rose, 317); but the creditors are not entitled to interest upon interest, nor will such subsequent interest be allowed to diminish the bankrupt's allowance. (1 Ves. 132; 3 Bro. 79; 1 Atk. 75; 3 Bro. 436). If, after the payment of the debts, there is a surplus consisting of real and personal estate, the personal estate is first to be applied in payment of the interest, and, if that is deficient, the real estate must be resorted to; but, if the bankrupt is dead, and the real and personal estate is more than sufficient to pay the debts, with interest, the surplus real estate must be conveyed to the heir if he died intestate, and his personal estate be divided amongst his next of kin. (1 Atk. 75).

‡ Where a commission is superseded, an action of trespass may be maintained against the assignees for taking the goods. (2 Wils. Rep. 382). The consequence of a supersedeas being, that every thing which was done under the commission is rendered void; (8 Ves. 534; 1 Atk. 145; 10 Ves. jun. 94); but see the 87th section, 6 Geo. 4, c. 16, which enacts, "That titles to property, sold under commission, shall not be impeached, unless proceedings to supersede be commenced within twelve months."

A trader, to obtain a supersedeas, agrees to pay A.'s claim in consideration thereof, provided he recovers a certain estate:—Held, that an action was maintainable, he having taken no steps whatever for its recovery. (Lord Denman, C. J. —*Edmunds v. Wilkinson*, H. T. 1836, N. P., 7 C. & P. 387).

for costs (if the said Court shall think fit to require any security) as by the said Court shall be approved, shall direct an issue to try any matter of fact affecting the validity of such adjudication by a jury, to be duly impaneled and sworn for that purpose before the Chief Judge, or any one or more of the other Judges of the Court of Bankruptcy; and if the verdict on such issue shall not be set aside, on application to the said Court of Review, within one month after the said trial, or if the adjudication of the commission shall not be set aside by the said Court of Review on the petition aforesaid, such verdict, or such adjudication, of the said commissioner shall in all cases, as against the said bankrupt, and also as against the petitioning creditor, and as against any assignee to be chosen of any such bankrupt's estate and effects, and as against all persons claiming under the said assignees, and all persons indebted to the bankrupt's estate, be conclusive evidence that the party was or was not a bankrupt at the date of such adjudication, any other act, debt, or trading than the act, debt, or trading proved at such trial notwithstanding: Providing always, that an appeal shall be made to the Lord Chancellor from the decision of the said Court of Review, upon matter of law or equity, or on the refusal or admission of evidence only."

By sect. 18, it is provided, "That, after any such issue shall have been tried as aforesaid, it shall and may be lawful for the Lord Chancellor, on petition to him, to be presented within one calendar month after such verdict, and upon notice thereof to the bankrupt, upon special circumstances, to be submitted to the said Lord Chancellor, to order that another fiat do issue at the instance of any other than the former petitioning creditor against the said bankrupt, and that such fiat shall and may be supported by any debt, trading, or act of bankruptcy, other than those given in evidence on the trial of such issue."

By sect. 19, it is enacted, "That it shall be lawful for the said Lord Chancellor, upon the reversal of any adjudication of bankruptcy, or for such other cause as he shall think fit, to order that any fiat issued by virtue of this act shall be rescinded or annulled; and such order shall have all the force and effect of a writ of supersedeas of a commission, according to the existing laws and practice in bankruptcy."

By sect. 42, it is enacted, "That from and after the passing of this act, no commission of bankrupt shall be superseded, nor any fiat annulled, nor any adjudication reversed, by reason only that the commission, fiat, or adjudication has been concerted by and between the petitioning creditor, his solicitor or agent, or any of them, and the bankrupt, his solicitor or agent, or any of them, save and except where any petition to supersede a commission for any such cause shall have been already presented, and shall be now pending."

After such issue, a new fiat may issue.

And the former fiat be annulled.

But not on the ground of concerted acts of bankruptcy.

XXIII. OF THE CERTIFICATE.

(a) OF SIGNING IT.

1. *By the Creditors* *.

* Formerly, *four-fifths* in number and value of the creditors, or, after six months, *three-fifths*, must have signed. But now (6 Geo. 4) the certificate must be signed by

2. *By the Commissioners* *.3. *Time of Signature, and Form of* †.

(b) OF ITS ALLOWANCE AND CONFIRMATION ‡.

(c) OF STAYING THE CERTIFICATE §.

(d) CIRCUMSTANCES WHICH AVOID IT OR DEFEAT ITS OPERATION.

1. *By Statute* ||.

four-fifths in number and value of creditors above 20*l.*, or, after six months, by three-fifths in number and value, or nine-tenths in number. The 5 Geo. 4, c. 98, s. 120, contained a clause, that one opposing creditor should not prevent the Lord Chancellor, in his discretion, allowing the certificate. But that statute is now repealed. (6 Geo. 4, c. 16). The creditors' signatures to the certificate must be proved.

* By 5 Geo. 2, c. 30, and 6 Geo. 4, c. 16, s. 122, after directing what portion of the creditors are to sign, it is enacted, "That no such certificate shall be such discharge, unless the commissioners shall, in writing under their hands and seals, certify to the Lord Chancellor, that such bankrupt has made a full discovery of his estate and effects, and in all things conformed, and that there does not appear any reason to doubt the truth or fulness of such discovery, and also that the creditors have signed in manner thereby directed. But see 1 & 2 Will. 4, *infra*."

† The creditor must, at the time of signing, write opposite to his name the day of the month and year on which he signs. The date need not be affixed by the creditors themselves, nor in their presence, provided it be added at the time; and if an omission as to the signature or attestation of the signature of the certificate is satisfactorily explained, the certificate cannot be stayed. Commissioners were directed to sign, though the year was omitted to a signature which was between others dated after the last examinations.

‡ When the commissioners have signed the certificate, notice must be given in the London Gazette, that the same will be allowed, unless cause is shewn to the contrary on or before a particular day, which is always twenty-one days from the notice in the Gazette. (Cooke, B. L. 463).

§ By the 5 Geo. 2, c. 30, s. 10, and 6 Geo. 4, c. 16, s. 122, (after directing that a proportion of the creditors and the commissioners must sign), it is enacted, "That no such certificate shall be such discharge, unless the bankrupt make oath in writing, that such certificate and consent were obtained without fraud, and unless such certificate shall, after such oath, be allowed by the Lord Chancellor, against which allowance any of the creditors of the bankrupt may be heard before the Lord Chancellor."

But since the 1 & 2 Will. 4, c. 56, the certificate must be allowed by the Court of Review.

§ Inconsistency of statement appearing upon bankrupt's examination is a ground for staying the certificate; (17 Ves. 117); or, if it be obtained by money, it will be stayed. (10 Ves. 359). And where the assignees were the bankrupt's near relations, and the certificate was signed within three months after the issuing of the commission, upon petition by a creditor to prove his debt, to stay the bankrupt's certificate, and for liberty to assent or dissent thereto, the application was granted. (1 Atk. 84). So, where a certificate was signed on the very day the bankrupt finished his last examination, and within six weeks from the time of issuing the commission, and the principal creditor lived at Guernsey, and had not been able to inquire into the bankrupt's conduct, or to prove his debts, the Lord Chancellor stayed the certificate. (1 Atk. 82, 84). But if, after a certificate by creditors sufficient in number and value, and the signature and consent have been certified by the commissioners, new creditors, who have proved debts, will not, unless on the ground of fraud, be entitled to stay the certificate. (1 Atk. 73).

|| 1st. *Creditors signing the certificate for money* renders the certificate void, whether the bankrupt knew it or not; (1 B. & P. 95; 1 Doug. 227); unless the signatures preceding are sufficient in number and value to make the certificate available; (15 East Rep. 248); or the money is given on purpose to render the certificate void.

2nd. *Bankrupt concealing effects, or losing money at play.* By 5 Geo. 2, c. 30, and 6 Geo. 4, c. 16, s. 180, if the bankrupt has concealed property to the value of

2. Upon Grounds independent of Statute*.

(e) OF RECALLING THE CERTIFICATE†.

(f) OF THE EFFECT OF THE CERTIFICATE.

1. As to the Nature of the Demands discharged by it‡.

THOMAS v. WILLIAMS, T. T. 1834. K. B. 3 N. & M. 545; S. C. 1 Ad. & E. 685.

IN an action of debt for wages, it appeared that the bankrupt, the defendant, employed the plaintiff as his clerk, at a yearly salary, and before the expiration of the year the defendant's commission issued; and shortly after, the plaintiff, with other clerks, left the employ:—

Held, that the salary, not being due at the date of the commission, was not proveable, and therefore not barred by the certificate.

The certificate is only a bar to debts due at the date of the commission§.

10*l.*, his certificate is void. Formerly, if the bankrupt had lost at play 5*l.* in one day or 100*l.* in 12 months next preceding his bankruptcy, or 100*l.* within one year by stock contracts, his certificate was void. But, by 6 Geo. 4, now it is not void, unless he has lost 20*l.* in one day by gaming, or 200*l.* within one year next preceding the bankruptcy, or 200*l.* by stock-jobbing.

3rd. *Bankrupt wilfully destroying books, &c.* By the 6 Geo. 4, c. 16, s. 130, so the certificate is void if he has wilfully destroyed his books, or made false entries; or, formerly, if he permitted fictitious debts to be proved, *without disclosing it before the commissioners had signed such certificate.* But now (6 Geo. 4) it must be disclosed to the assignees within one month after knowledge of the same. Formerly, by the 5 Geo. 2, c. 30, a bankrupt paying, upon marriage of his child, above 100*l.*, unless he could prove he had sufficient funds to pay his debts, rendered the certificate void; but this is repealed by the 6 Geo. 4.

4th. *Creditors on fictitious debts.* By the 5 Geo. 2, c. 30, and 6 Geo. 4, c. 16, s. 130, creditors signing on fictitious debts render the certificate void.

* If the bankrupt has obtained no certificate under a first commission, a certificate under the second will be of no avail; for such second commission against an uncertificated bankrupt, and all the proceedings under it, are void. (1 Atk. 252; Cowp. 824).

† After the allowance of a certificate, it may be recalled and disallowed, (*Anon.*, Dav. B. L. 437; *Ex parte Cawthorne*, 2 Rose, 187; *Ex parte Tallis*, 1 Ball & Beatty, 321), if a clear case is established against the bankrupt. (*Ex parte Hood*, 1 Gl. & J. 220). It may be recalled if fraudulently obtained by the proof of fictitious debts, notwithstanding the lapse of two years from the time of its allowance; (*Ex parte Cawthorne*, 2 Rose, 187; 19 Ves. 261); or, if the signature of the Court be obtained by imposition. (*Ex parte Cawthorne*, 2 Rose, 187; 19 Ves. 261). If an assignee present a petition to stay a certificate, which is dismissed, and, six years after the certificate has been allowed, the assignee present a petition to recall the certificate upon the discovery of new facts, and strong suspicion is entertained by the Court that the certificate is obtained unfairly, the Court will not recall the certificate. (*Ex parte Reed*, Buck, 430).

‡ By 6 Geo. 4, c. 16, s. 121, "Every bankrupt who shall have duly surrendered, and in all things conformed himself to the laws in force concerning bankrupts at the time of issuing the commission against him, shall be discharged from all debts due by him when he became bankrupt, and from all claims and demands hereby made proveable under the commission, in case he shall obtain a certificate of such conformity so signed and allowed; but no such certificate shall release or discharge any person who was partner with such bankrupt at the time of his bankruptcy, or who was then jointly bound, or had made any joint contract with such bankrupt."

§ Certificate exonerates not only a guarantee from his liability on a bill of exchange, but from the costs of any action which may have been brought against his principal. (*Bottomley v. Wilson*, 1820, N. P. 3 Stark. 148). A bankrupt's certificate is no bar to an action brought against him on bills of exchange, indorsed by him to a creditor, for a debt due before the bankruptcy. (*Brix v. Braham*, T. T. 1823, C. P., 1 Bing. 281; S. C. 8 B. Mo. 261). A bankrupt's certifi-

JACOBS v. PHILLIPS, T. T. 1834. Ex. 1 C., M. & R. 195; S. C. 2 D. P. C. 716; S. C. 4 Tyr. 652—S. P. OSWALD v. WILLIAM, T. T. 1836. Ex. 5 D. P. C. 159; S. C. 1 M. & W. 550; S. C. 1 T. & G. 935.

Interlocutory costs, if taxed before the bankruptcy, are discharged by the certificate*.

AFTER costs were taxed on the 21th day of January, a fiat in bankruptcy was issued against the defendant, under which he was declared a bankrupt. He was taken into custody on the 21st of April, when an attachment issued out of this court for nonpayment of the sum of 131*l.* 9*s.*, the costs above mentioned, after a previous demand. The defendant obtained his certificate under the fiat. On motion to discharge the defendant out of custody—

Per Cur.—We have considered this question, and are all of opinion that the bankrupt is entitled to his discharge; because, there was an ascertained claim or demand before the bankruptcy, from which the bankrupt was discharged by his certificate.

HAIGH v. JACKSON, T. T. 1838. Ex. 3 M. & W. 598.

A drawer and indorser of a bill for the accommodation

THIS was an action for money paid under the following circumstances:—The defendant drew a bill of exchange upon another person, which was accepted by him, and to which, at the defendant's

cate, before allowance, does not divest his creditors of their right to a legacy. (*Tudway v. Bownee*, 2 Ken. 423; S. C. 2 Burr. 716).

Where the plaintiff was surety for the bankrupt for rent, which had not become due until after the commission issued against him, and the bankrupt obtained his certificate:—Held, that he was not a surety within the meaning of the 49 Geo. 3, c. 121, s. 8, which is restrained to debts existing as debts at the time of the issuing of the commission; and that he was, therefore, entitled to recover the rent he had been called on to pay as such surety. (*M'Dougal v. Paton*, 8 Taunt. 480; S. C. 2 B. Mo. 644).

The surety under an annuity deed may maintain an action against the principal for the value of an annuity redeemed by him subsequently to the bankruptcy of the principal. (*Watkins v. Flanagan*, 1 Bing. 413; S. C. 3 B. & Ald. 186; S. C. 8 Moore, 840; S. C. 13 Price, 24).

A surety under an annuity deed, who has redeemed the annuity subsequent to the commission, may proceed by action against the grantor, who has obtained his certificate, for the arrears of the annuity; and he is entitled to the benefit of the grantee's proof under the commission. (*Watkins v. Hannagan*, 1 G. & J. 199).

Where a principal proves his debt under a commission of bankruptcy against the person for whom the surety is bound, he does not discharge the surety. And it seems doubtful whether, when the principal has signed the certificate, he has not discharged the surety. But, where a bankrupt had conducted himself properly, and the surety had gone abroad immediately after the bankruptcy, the Court determined that the surety was not discharged, although the principal had signed his certificate. (*Langdale v. Parry*, 2 D. & R. 337).

In an action brought by an accommodation acceptor of a bill against the drawer, after he had become bankrupt and obtained his certificate, for not providing funds, whereby the plaintiff had incurred the costs of an action, and been obliged to sell an estate to raise funds:—Held, that, as the right to the principal debt was barred by statute, the right to damages, which are necessary and consequent on that debt, was also barred. The 49 Geo. 3, enabling the plaintiff as surety to prove his demand in respect of money paid, and enacting that the bankrupt should be discharged of all demands at the suit of the surety in regard to his debt in respect of such suretyship, makes the certificate a bar, not only to any claim for the party's money which established the principal debt, but also to any consequential damage arising from that debt not having been duly paid. (*Van Sandau v. Corsbie*, 8 Taunt. 550; S. C. 2 Moore, 602; S. C., (judgment affirmed), 3 B. & Ald. 13).

* The certificate discharges a debtor from a claim upon a cognovit for debt and costs as between attorney and client, where he becomes bankrupt before judgment signed. (*Patteson, J.*—*Metcalf v. Walling*, T. T. 1834, B. C., 2 D. P. C. 552)

request, the plaintiff put his name as indorser. Before the bill became due the defendant became a bankrupt, and the bill not being subsequently satisfied the plaintiff was compelled to pay the amount to the holder, and afterwards brought this action against the defendant for money paid.

The Court held, that this was a debt proveable under the commission, and that the defendant was discharged from it by having obtained his certificate under the 6 Geo. 4, c. 16.

of the bankrupt cannot sue him after certificate.

BARRON v. MARTELL, H. T. 1827. K. B. 9 D. & R. 390.

MOTION for an attachment. It appeared, that, by the Master's allocatur, the defendant, an attorney, was ordered, on the 12th of May, to pay over to his client ———l. on the 20th of June; before that day arrived he became bankrupt, and had since obtained his certificate.

So, money payable under the Master's allocatur is barred by the certificate.

It was contended, that the bankruptcy and certificate were no answer; but the Court held it was a mere civil debt, and discharged by the certificate.

HOPE v. BOOTH, M. T. 1830. K. B. 1 B. & Ad. 498.

UPON an agreement for the purchase of premises, the price to be paid for on a given day, or when a good title should be tendered; and that, if the purchaser should be desirous, it might remain as a charge on the premises, so as that upon completion of the conveyances the vendor should have a proper security for the price, with interest; and the purchaser covenanted to pay interest so long as the price remained unpaid, with a proviso, that, if the interest were in arrear for thirty days, the purchaser should be considered as a tenant to the vendor, at a stated rent, payable half-yearly, and the latter should have power to distrain. The purchaser did require the purchase-money to remain so charged for five years, was let into possession, and subsequently became bankrupt; the vendor distrained for the stipulated rent, and it was paid by the assignees; upon further arrears becoming due, after the bankrupt had obtained his certificate, and an action of covenant brought, to which he pleaded his bankruptcy generally—

A. covenants to purchase an estate of B., and either to pay the purchase-money by a certain time, or for it to be a charge on the estate at interest; A. agrees to pay the purchase-money in five years, and to pay interest in the mean time, A. becomes bankrupt:—Held, that A.'s certificate was a bar.

Per Cur.—We think the instrument in question was not a lease, but only a contract for a sale; and that the remedy by distress was given merely as an additional security. That clause alone, seeing the purpose for which it was introduced, would not make the instrument a lease. Then the question is, whether the plaintiffs could have proved their debt under the commission. We think that the plaintiffs were in the situation of unpaid vendors; and, according to the case *Ex parte Gyde in the matter of Hart*, (1 G. & J. 323), persons filling the situation of these plaintiffs have a right, on petition to the Great Seal, to sell the estate in discharge of their lien upon it for the unpaid purchase-money, and to prove against the estate for the deficiency. It follows, that the bankrupt, the present defendant, is discharged.

PARKER v. CROLE, T. T. 1828. C. P. 5 Bing. 63; S. C. 2 M. & P. 150.

ACTION on the case, in tort, against a broker, for selling out But bankruptcy

and certificate
no answer to an
action of tort.

plaintiff's stock contrary to orders. The defendant pleaded his bankruptcy and certificate, to which the plaintiff demurred; and, after argument—

The Court said, if we were to decide for the defendant in this case, we should not only overturn all the cases from *Uttersson v. Vernon*, (4 Term Rep. 570), to the present time, but also the bankrupt laws, for they were intended only to protect a man from debts which, from misfortune, he is become unable to pay, and not to protect him from the consequences of his fraud. In *Goodtitle v. North*, (Doug. 584), it was held, that bankruptcy is no bar to an action for mesne profits. In *Parker v. Norton*, (6 Term Rep. 695), it was established, that where a party could maintain either an action for tort, or might waive the fraud and sue in assumpsit, yet, if he chose to pursue the former remedy, a plea of bankruptcy would be no answer.

CLEMENTS v. LANGLEY, T. T. 1833. K. B. 5 B. & Ad. 372;
S. C. 2 N. & M. 269.

Or where a
surety, after the
bankruptcy of a
co-surety, and
after default by
their principal,
pays money for
his co-surety.

Two persons joined as sureties for a third in a bond to secure a sum of money and interest. Default was made in payment of the interest, but no application was made to the sureties for payment. One of the sureties afterwards became bankrupt, and obtained his certificate, and subsequently the other surety was called upon and obliged to pay the principal sum and interest. In an action for contribution against his co-surety—

The Court held, that the 52nd section of the 6 Geo. 4, c. 16, means surety for a debt of the bankrupt at the time of the commission. The mere previous forfeiture of the bond, as between the obligors and obligee, does not make this a debt of the surety as between the co-sureties. In the case of a bond to replace stock, though not forfeited at the time of the insolvency, the discharge has been held to be a bar; (*Sammon v. Miller*, 3 B. & Ad. 596); but not in a case of a bond to indemnify a lessee from the payment of rent and performance of covenants in a lease, which he assigned to the obligor. (*Taylor v. Young*, 3 Barn. & Ald. 521). In *Wood v. Dodgson*, (2 M. & Sel. 195), there was a clear ascertained debt before the bankruptcy.

WATKINS v. FLANNAGAN, H. T. 1824. Ex. 13 Price, 24; S. C. 1 Bing. 413; S. C. 3 B. & Ald. 186; S. C. 8 Moore, 840.

So, a surety for
the payment of
an annuity, who
is called upon
to pay after the
bankruptcy and
certificate of the
principal, may
recover over
against the lat-
ter, notwith-
standing the
certificate.

DEBT on an indemnity bond, by the surety, for the payment of an annuity by the defendant, to recover the money paid to the grantee after the defendant became bankrupt. It appeared, that the grantee had proved for the arrears and value of the annuity under sect. 7 of the 9 Geo. 3, c. 121, and the surety then redeemed and repurchased after the issuing of the commission, and before final dividend.

The Court held, that the proof by the grantee was not a voluntary act; and that the surety, as he still remained after the bankruptcy and certificate of the principal liable on the covenant for breaches from time to time, was consequently entitled to recover over against the bankrupt, notwithstanding the certificate.

ATWOOD v. PARTRIDGE, E. T. 1827. C. P. 4 Bing. 209; S. C. 12 Moore, 431.

THE indenture declared on bore date the 26th October, 1825, and was made between one Robinson of the first, the defendant of the second, and the plaintiffs of the third part; by which it was recited that a policy of insurance had been effected on the life of Robinson; that he was indebted to the plaintiffs in the sum of 1500*l.*; that it had been agreed that an assignment of the policy should be made to the plaintiffs by way of security; and that the defendant should guarantee the due payment of the premium on the policy. Robinson assigned the policy to the plaintiffs, and the defendant covenanted with them that Robinson should regularly pay the annual premium on the policy, and should not do any act to make it void, so long as any thing should remain due from Robinson to the plaintiffs. The plaintiffs, in their declaration, averred, that divers sums of money due to them from Robinson remained unpaid; that, while they were so unpaid, the annual premium on the policy became due; and that the plaintiffs, in order to keep the policy available, had been obliged to pay the premium. At the trial, it appeared the defendant had been a bankrupt before, and had obtained his certificate since the premiums became due.

And a covenant as a surety for payment of premiums of insurance by A. B., where the premiums do not become due before the bankruptcy but before the certificate, the certificate does not discharge the bankrupt.

Per Cur.—It is clear, that this was not a debt made proveable by the 56th section of 6 Geo. 4, c. 16. The defendant is not a surety for the debt due from Robinson to the plaintiffs. He merely undertakes to pay what might have become a debt in case Robinson should fail to do so. On failure by Robinson to pay the premium on the policy, the plaintiffs had a right of action against the defendant for unliquidated damages; for the amount would vary according to circumstances, depending on the amount of premium which the plaintiffs might be obliged to pay, or, in case of Robinson's death, the annual premiums not having been regularly paid, the defendant would have become liable to the plaintiffs for the whole amount of the debt due to them from Robinson.

YALLOP v. EBERS, T. T. 1831. K. B. 1 B. & Ad. 698.

A BANKRUPT, prior to his bankruptcy, had contracted to take up A.'s acceptance, or indemnify him against it, but did neither; and A., after the bankrupt had obtained his certificate, paid it himself.

The Court held, that bankruptcy was no defence to an action brought by A. for a breach of promise, inasmuch as, at the time of the commission, no debt was in existence between the parties; neither had the defendant "contracted any debt payable upon a contingency," within the meaning of the 56th section; nor was the relationship between them, at the time of the bankruptcy, that of a "surety," according to the 52nd section.

See 2 Campb. 189; 5 Taunt. 195; 9 B. & C. 145.

So, a contract by a bankrupt to take up an acceptance of the plaintiff, and indemnify him, may be sued on where the plaintiff pays the amount after the bankruptcy.

CAREW v. EDWARDS, E. T. 1832. K. B. 1 N. & M. 632; S. C. 4 B. & Ad. 351; S. C. 2 D. P. C. 613.

PLEA of bankruptcy to debt on bond. It was proved, that, since the date of the bond, the defendant had been discharged under the

So, taking the benefit of

the Insolvent Act is, under the 6 Geo. 4, c. 16, the same as a bankruptcy; and therefore, where the debtor afterwards becomes bankrupt, and does not pay 15s. in the pound, the certificate is no bar.

Insolvent Debtors' Act, but had omitted to insert the bond in his schedule. Afterwards, a commission of bankruptcy issued against the defendant, under which he was declared bankrupt; and before the 2nd May, 1825, (the day on which the 6 Geo. 4, c. 16, received the royal assent), he obtained his certificate. The bankrupt's estate had not produced 15s. in the pound.

The Court held, that, the defendant having been discharged under an Insolvent Act, and subsequently became bankrupt and obtained his certificate, but did not pay 15s. in the pound, the certificate was no bar to an action on a bond not inserted in his schedule. In this respect a bankruptcy, after a discharge under the Insolvent Debtors' Act, stands upon the same ground as a second bankruptcy.

WHITTAKER *v.* MASON, H. T. 1838. C. P. 6 D. P. C. 429.

Where, after action brought, defendant becomes bankrupt, the plaintiff proves, and the defendant obtains his certificate, he may proceed to trial by proviso.

THIS was an action for goods sold, and for not delivering bills of exchange by a certain time. In Michaelmas Term, 1835, this Court gave judgment for the defendant, (see 2 Bing. N. S. 359; S. C. 2 Scott's Reports, 567), on demurrer to the replication to one of the pleas; but the recovery of the defendant's costs thereon was stayed by a Judge's order until the trial of the issues in fact. The defendant became bankrupt in Dec. 1835, and the plaintiffs proved under the commission for the price of the books, upon the contract for the sale of which the action was brought; and, in 1836, a dividend of 1s. in the pound was paid, and the defendant obtained his certificate. Subsequently, an offer made on the part of the defendant, that all proceedings should be stayed upon the plaintiffs' entering a nol. pros. upon the second count, and paying the costs of the demurrer, being rejected, the defendant's attorney gave notice of trial by proviso; therefore a rule was obtained for setting aside this and for staying all proceedings thereon.

Sed per Cur.—We have no right to interfere for the purpose of preventing the defendant from taking down his cause by proviso, a protection given to the party by the common law for the purpose of preventing the plaintiff from keeping a suit hanging over him without termination. The only terms upon which it can be done is by payment of the costs of the demurrer by the plaintiffs.

2. *As respects the Discharge of the Bankrupt's Person or Effects*.*

HANSON *v.* BLAKEY, H. T. 1828. C. P. 4 Bing. 493; 1 M. & P. 261.

Qu. whether, under sections

THE plaintiff sued the defendants, who were bankrupts, and signed judgment against them by default in Trinity Term, and en-

* By 6 Geo. 4, c. 16, s. 121, it is enacted, "That every bankrupt who shall have duly surrendered and in all things conformed himself to the laws in force concerning bankrupts, at the time of issuing the commission against him, shall be discharged from all debts due by him when he became bankrupt, and from all claims and demands hereby made proveable under the commission, in case he shall obtain a certificate of such conformity, so signed and allowed, and subject to such provisions as hereinafter directed; but no such certificate shall release or discharge any person who was partner with such bankrupt at the time of his bankruptcy, or who was then jointly bound, or had made any joint contract with such bankrupt.

tered up final judgment and issued execution in Michaelmas Term following. The defendants obtained their certificate on the 13th November; and the sheriff's officer, notwithstanding he had notice of that fact, on that day seized a hay-stack, and was about to sell it, when the defendants obtained a Judge's order, that the proceedings under the execution should be stayed, on their paying the amount of the debt and costs, with sheriff's poundage, into Court, to abide the event of a motion; and the defendants having applied to have the money paid out to them, the Court refused to interfere, but left the parties to their *audita querelâ*.

121 to 126, of 6 Geo. 4, c. 16 execution may issue against goods of bankrupt before certificate*.

DAVIS v. SHAPLEY, T. T. 1830. K. B. 1 B. & Ad. 54.

IN November, 1829, the plaintiff commenced an action against the defendant for goods sold and delivered. In December, 1829, a commission of bankruptcy issued against the defendant, under which he was duly declared a bankrupt, and obtained his certificate, which was allowed on the 29th April, 1830. The messenger under the commission seized the defendant's stock in trade as a grocer, and it was sold by the assignees. After the allowance of the defendant's certificate he resumed his business as a grocer, and purchased on credit a small stock to enable him to carry on such business; and for that stock he remained indebted to various persons. The plaintiff, notwithstanding the bankruptcy, continued the action and obtained a verdict; and on the 14th May taxed his costs and signed judgment. He afterwards issued a *fi. fa.* for the damages and costs.

The bankrupt's certificate, under the 6 Geo. 4, c. 16, protects his goods as well as his person.

Per Cur.—We think the defendant is entitled to relief upon motion. The 121st section enacts, "That every bankrupt who shall have conformed himself to the laws in force concerning bankrupts, at the time of issuing the commission against him, shall be discharged from all debts due by him when he became bankrupt, and from all claims and demands by this act made proveable under the commission, in case he shall obtain his certificate." A bankrupt, therefore, who has complied with the conditions mentioned in the act, is to be "discharged from all debts due by him when he became bankrupt." If, after his bankruptcy, his goods were to remain liable to be seized and sold, in order to satisfy a debt due at the time when he became bankrupt, he could not be said to be discharged from that debt. The enactment is express. We think, therefore, that a creditor, in respect of a debt due before the bankruptcy, is not at liberty to sue out an execution against the goods of his debtor after the latter has become bankrupt and obtained his certificate.

REX v. EDWARDS, T. T. 1829. K. B. 9 B. & C. 652.

THE defendant, an attorney, being in contempt for not paying a sum of money which he was ordered to pay by rule of Court, became bankrupt; a commission was taken out against him, and he afterwards obtained his certificate. Between the time of his last examination and his obtaining his certificate he was arrested under

Hence, an attorney, in custody for non-payment of money under a rule of court, is en-

* But if a *fieri facias* be sued out after the issuing of a commission of bankruptcy, and be executed after certificate obtained, the Court will set it aside and order the money so levied to be returned; even if he has omitted to plead his certificate. (*Lister v. Mundell*, 1 B. & P. 427).

titled to his discharge*.

the present attachment. Having afterwards obtained his certificate, he applied for a rule, calling upon the plaintiff to shew cause why he should not be discharged out of custody.

Per Cur.—This was a debt proveable under the bankruptcy, and the usual consequence must follow—that the certificate discharges the debtor. The fact of the defendant being an attorney gave the client the advantage of the proceeding by attachment; but it cannot alter the legal effect of the bankruptcy and certificate.

3. *Effect of Certificate, obtained here or abroad, on Debts contracted here or abroad*†.

(g) HOW BANKRUPT MAY AVAIL HIMSELF OF CERTIFICATE.

1. *By Plea.* See post, Div. XXXV. *Of the Bankrupt.*
2. *By Motion.* See ante, p. 166, and post, Div. XXXV. *Of the Bankrupt.*
3. *Evidence of.* See post, Div. XXXV. *Of the Bankrupt.*

(h) OF SECURITIES GIVEN NOT TO OPPOSE OR SIGN CERTIFICATE‡. See post, tit. *Bills and Notes.*

XXIV. SECOND AND THIRD COMMISSIONS AND FIATS.

NELSON *v.* CHERRELL, M. T. 1832. C. P. 7 Bing. 665; S. C. 5 M. & P. 680; S. C. 8 Bing. 316; S. C. 1 M. & Scott, 452.

ASSIGNEES under a second commission, the former one existing, and no certificate obtained, seized goods of the bankrupt.

The Court held, that, to a replication stating the former bankruptcy, a rejoinder that the goods were in the order and disposition of the bankrupt, by the permission of the first assignees, was bad; the second commission being of no avail.

See 10 B. & C. 427; 7 *Id.* 684.

There can be no second commission where a former one exists and no certificate obtained§;

* A certificate obtained after issue, and before judgment, was no ground for entering an exoneretur on the bail-piece. (*Humphreys v. Knight*, E. T. 1830, C. P., 6 Bing. 569). But if rendered by his bail, the Court will discharge him out of custody. (6 Bing. 572. See 1 & 2 Vict. c. 110).

† In general, a certificate which is a discharge by the law of one country amounts to a discharge in another. (1 Cooke, B. L. 487, 8th ed.). But an Irish certificate is no answer to an action on a contract made in England. (2 G. & J. 87).

‡ In *Birch v. Jervis*, (T. T. 1828, N. P., 3 C. & P. 379), it was decided, that a bill given not to oppose a certificate is good in the hands of a bona fide holder. But a bill given to induce a creditor to sign a certificate is void even in the hands of a bona fide holder.

§ Where a defendant has been twice a bankrupt, and has not paid 15s. in the pound under the second commission, the Court (unless he be in actual custody) will not relieve him on motion in an action against him at the suit of a creditor whose debt may have been barred by the commission, but will leave him to his plea. (*Anon.*, 5 Law J., K. B., 212). A second commission against a bankrupt, who has not obtained his certificate under a previous subsisting commission, is void at law; consequently, a certificate obtained under the second commission is unavailing. (*Hill v. Wilson*, 6 Law J., K. B., 127).

TILL v. WILSON, H. T. 1828. K. B. 1 M. & R. 580; S. C. 7 B. & C. 684.

A BANKRUPT had obtained his certificate under a second commission, issued pending a former one awarded and never disposed of.

The Court held, that such second commission was a nullity, there being, so long as the bankrupt's property was vested in the assignees under the former one, nothing upon which it could operate; he was not, therefore, entitled to be discharged out of custody in an action for a debt contracted prior to the second commission.

the second commission being void*.

LEDBETTER v. SALT, E. T. 1828. C. P. 4 Bing. 623; S. C. 1 M. & P. 597.

Per Cur.—Under a second commission, the writ of supersedeas of the first is sufficient proof of its having issued.

See facts, Abr. ante, Div. Petitioning Creditor.

But the writ of supersedeas of the first is sufficient proof of its having issued.

GOULD v. SHOYER, T. T. 1830. C. P. 6 Bing. 738; S. C. 4 M. & P. 635.

IT appeared, that, in June, 1827, a commission had issued against Serjeant, under which he was declared a bankrupt; that, in October following, the lease in question had been put up to sale by public auction by the assignees appointed under that commission, and sold to the defendant; that, in May, 1829, a petition was presented to the Great Seal to supersede this commission, and it was accordingly superseded; and that a second commission was subsequently sued out against Serjeant, under which last-mentioned commission the present plaintiffs were chosen assignees. The question was, whether the purchase by the defendant from the assignees under the superseded commission was valid or protected by the 87th section of the 6 Geo. 4, c. 16.

Sales made by the assignees under a commission, which has been superseded, are void as against the assignees chosen under a subsequent commission, not being within the 6 Geo. 4, c. 16, s. 87.

Per Cur.—The 87th section was intended to take away the power of the bankrupt to question titles derived under the commission, unless when he commenced and duly prosecuted proceedings to supersede it within twelve months, and not to restrain assignees under a second commission; a purchaser, having just title to protection, ought to appear before the Great Seal when the supersedeas of the former commission is obtained. If he does not, he is not protected from the claim of assignees under a subsequent commission.

PHILLIPS v. HOPWOOD, H. T. 1831. K. B. 1 B. & Ad. 619.

THE bankrupt had been a bankrupt before the commission under the authority of which the plaintiff now sued as assignee; and he had never obtained his certificate under that first commission. The defendant in this action had not given any notice of his intention to dispute the commission in this cause.

Per Cur.—The omitting to give the notice in question merely admits the facts of trading, of there being a good petitioning cre-

In an action by assignees under a second commission, defendant may shew no certificate under first, and avail

* The second commission is not absolutely void, but voidable. This was decided in a former case. (*Todd v. Maxfield*, T. T. 1824, K. B., 3 B. & C. 222; S. C. 5 D. & R. 258).

himself of it, without notice to dispute being given*.

ditor's debt, and an act of bankruptcy. But the effect of all those facts is still an open question of law; and the fact shewn by the defendant proves that the Lord Chancellor had no legal authority to issue the second commission. That is consistent with all the facts admitted by not giving the notice referred to. We think, therefore, that the defendant was not precluded from taking this objection.

EICKE v. NOKES, H. T. 1829. N. P. 1 *M. & M.* 303; S. C. 2 *D. P. C.* 820; S. C. 1 *Bing. N. S.* 69, *not S. P.*

Notwithstanding a bankrupt does not pay 15s. in the 1*l.* under first commission, his bankruptcy and certificate under a second commission are a bar to an action.

To an action for work and labour, the defendant pleaded bankruptcy and certificate, which he proved; thereupon the plaintiff produced a composition deed between the bankrupt and his creditors executed before the commission, and insisted that, as it did not appear that the bankrupt's estate had produced 15s. in the pound under the commission, his bankruptcy and certificate did not furnish any answer to the present action, although they protected his person from arrest and imprisonment under the 6 Geo. 4, c. 16, s. 127.

Sed per Lord Tenterden, C. J.—Bankruptcy and certificate protect only the person of the bankrupt, not his future estate and effects; but they vest these latter in the assignees under the commission. It would seem extraordinary that the bankrupt's person should be protected and the property vested in the assignees, and yet the action be maintainable.

ROBERTSON v. SCORE, H. T. 1832. K. B. 3 *B. & Ad.* 338.

And a bankrupt, under a second commission, cannot be sued by an individual creditor, although he has not paid 15s. in the 1*l.* under such commission.

By the 6 Geo. 4, c. 16, if a party become a second time a bankrupt, and do not, on such second commission, pay 15s. in the pound, the certificate shall only protect his person from arrest and imprisonment; but his future estate and effects shall vest in the assignees under the said commission, who shall be entitled to seize the same, as they might have done property of which the bankrupt was possessed at the time of issuing the commission.

The Court held, that this section applies as well to a commission sued out before the passing of the act as after; and that, at all events, in an action for a debt proveable under such second commission, the bankrupt might plead his bankruptcy and certificate in bar.

YOUNG v. RISHWORTH, T. T. 1838. Q. B. 3 *N. & P.* 585; S. C. 8 *A. & E.* 470—*S. P. ELSTON v. BRADDICK*, H. T. 1834. Ex. 2 *C. & M.* 435.

The 6 Geo. 4, c. 16, s. 127, is retrospective with respect to the future effects of a bankrupt who does not pay 15s. in the 1*l.* under the second com-

ASSUMPSIT for money received by defendant for plaintiff's use. Plea, that, on the 15th July, 1832, the plaintiff became a bankrupt; a commission issued against him, under which he obtained his certificate; that, afterwards, on the 20th May, 1825, he became bankrupt again; a second commission issued against him; and, after the passing of 6 Geo. 4, c. 16, to wit, on the 1st April, 1826, he obtained his certificate; under this second commission, nevertheless, his estate had not produced sufficient to pay 15s. in the pound;

* In an action to try the validity of a second commission, the first being superseded, an application for production of bankrupt's books and papers must be made to the Chancellor, not to the Court where action is pending. (*Wilson v. Legge*, 7 Moore, 400).

whereby, and by force of the statute, the debt in the declaration mentioned hath vested in the assignees under the last-mentioned commission. Demurrer.

Per Cur.—The question is, whether, under the circumstances disclosed in that plea, the plaintiff is entitled to bring this action; and that mainly depends (as was admitted in argument on both sides) upon the proper construction of the 127th section of 6 Geo. 4, c. 16; because, if that statute applies to the cases of bankruptcy which took place before it passed, it was hardly contended but that the plea does amount to an answer to the action; and, we think, that, after the decisions which have taken place, the question can no longer be considered as open. The language of the 127th section of 6 Geo. 4, c. 16, is as follows:—"If any person, who shall have been so discharged by such certificate as aforesaid, &c., shall be or become bankrupt, and have obtained, or shall hereafter obtain, such certificate as aforesaid, unless his estate shall pay 15s. in the pound, his future estate and effects (except, &c.) shall be vested in the assignees under the commission." And, upon this point, whether the bankruptcy does apply to commissions sued out, and certificates thereunder obtained, before it passed, or, in other words, whether the statute just quoted be, in its effects, retrospective, the Court of Exchequer, after deliberation and a careful comparison of the language of the two statutes, (5 Geo. 2, c. 30, and the present act), have come to a decision in the affirmative. That being so, we consider ourselves bound by that decision; being of opinion, that it is most inconvenient to question the authority of cases deliberately decided, except for the strongest and clearest reasons.

mission. And if such bankrupt sues, it is a good plea that the plaintiff did not pay 15s. in the 1*l*.

BENJAMIN v. BELCHER, H. T. 1840. Q. B. 3 P. & D. 317.

THIS was an action of trover. The defendant pleaded a fiat in bankruptcy, dated the 19th of December, 1836, against Israel Alexander, under which he was appointed assignee; that Israel Alexander, at the time he became bankrupt, had, by the consent and permission of the true owner, in his possession, order, and disposition the goods in the declaration mentioned, and was the reputed owner. The plaintiff replied,—a commission of bankruptcy against Israel Alexander, dated the 30th October, 1809, under which he obtained a certificate in January, 1810; and also, subsequently a commission against Israel Alexander, dated the 10th November, 1821, under which James Husband was appointed assignee, and under which Israel Alexander obtained his certificate in December, 1821, and that the estate did not produce 15s. in the pound; and so that the fiat in December, 1836, was void. The defendant rejoined, that both the commissions, and certificates under them, were before the passing of 6 Geo. 4, c. 16; without this, that the fiat in December, 1836, was void. To this the plaintiff demurred.

In a subsequent case the preceding rule was limited to a second commission after the passing of the act.

Per Cur.—We think the 6 Geo. 4, c. 16, s. 127, has not a retrospective operation, so as to affect second bankruptcies which happened before the act. With respect to the case of *Young v. Rushworth*, in which this Court held that the 127th section did apply; but then the second certificate was in April, 1826, after the 6 Geo. 4, came into operation, although the second commission was between the passing of the act, May 2nd, 1825, and its coming into general operation, which was on 1st September, 1825, namely, on the 20th

May. But, it should be recollected, the 6 Geo. 4, came into operation *as to* the certificate immediately on its passing. In sect. 131, the Court in this last case used the term “retrospective,” and certainly seemed to treat the point now under discussion as decided by *Elston v. Braddick*, (2 C. & M. 435); but, on attending to the dates in both cases, it became clear the point was not included in either.

FOWLER *v.* COSTER, H. T. 1830. K. B. 10 B. & C. 427; S. C. 5 M. & Ry. 352.

A third commission against a party who has not paid 15s. in the 1st under second is absolutely void.

THE defendant had been three times a bankrupt; no dividend whatever had been paid under either of the commissions, but under each he had obtained his certificate. The debt in this action arose upon a bill of exchange. It was contracted between the second and the third commissions.

Per Cur.—It was contended, that the third commission was not void, but voidable only; and, in support of this, reliance was placed on the 127th section, by “which the certificate is made evidence of the trading, bankruptcy, commission, and other proceedings precedent to the obtaining the certificate.” But, we think, this means only, that the certificate shall be evidence of those facts; leaving untouched the question as to the validity of the commission. We think, that, under such circumstances as these, the Lord Chancellor had no legal power to issue the third commission. In this respect, as was observed in the argument, the language of the 6 Geo. 4, c. 16, s. 127, is stronger than that of the 5 Geo. 2, c. 30, s. 9. In the latter, the future property is made *liable* only; in the present act it is absolutely vested in the assignees. We do not see how we could give effect to this provision, or to the check which it was intended to put upon persons like the present defendant, if we did not hold that the third commission was absolutely void.

XXV. OF THE JURISDICTION OF THE CHANCELLOR IN BANKRUPTCY*.

XXVI. OF THE JURISDICTION OF THE VICE-CHANCELLOR IN BANKRUPTCY†.

* Under the 1 & 2 Will. 4, c. 56, the Lord Chancellor's jurisdiction in bankruptcy is transferred to the Court of Review. (Post, p. 174). But the Chancellor is at the head of the jurisdiction; (*Dicas v. Lord Brougham*, 6 Carr. & Payne, 250); and in cases of supersedeas has still a substantive power; (*Ex parte Keys*, 1 Mont. & Ayr. 226; S. C. Dea. & Ch. 263; *Ex parte Nokes*, 1 Mont. & Ayr. 461; *Ex parte Walker*, 2 Mont. & Ayr. 267); but he has no jurisdiction to hear any other original petition in bankruptcy. (*Ex parte Lowe*, 1 Dea. & Ch. 30). He sits on appeals. Although the Lord Chancellor sits in bankruptcy he is still Lord Chancellor, and no action lies against him for what he does in that capacity; even where he commits the solicitor to the commission for not obeying an order which he had no right to make. (*Lyndhurst, C. B.*—*Dicas v. Lord Brougham*, M. T. 1833, N. P., 6 C. & P. 249; S. C. 1 M. & Rob. 309).

† By the 1 & 2 Will. 4, c. 56, the Vice-Chancellor's jurisdiction in bankruptcy is also transferred to the Court of Review. (Post, p. 174). And he cannot sit on appeal. (1 & 2 Will. 4, c. 56, s. 3).

XXVII. OF THE JURISDICTION OF COURTS OF COMMON LAW.

RANSFORD *v.* BARRY, M. T. 1839. Ex. 7 D. P. C. 807.

A RULE to shew cause why proceedings in this action should not be stayed, the plaintiff having elected to proceed for the debt under the commission, by suing out a fiat in bankruptcy against the defendant.

The Court said, that, with reference to the question, whether or not there was enough to constitute an election, the rule could not be made absolute, as the application should be to the Court of Review, as formerly it should have been to the Great Seal; and they referred to *Harley v. Greenwood*, (5 B. & Ald. 95); *Kemp v. Potter*, (6 Taunt. Rep. 549); *Eicke v. Nokes*, (1 Bing. N. S. 69; 4 M. & Scott, 585).

Bankruptcy, and proof of debt, are no ground for staying an action at law; the application should be to the Court of Review.

XXVIII. OF THE COURT OF COMMISSIONERS. See ante, Div. VII.

XXIX. OF THE COURT OF BANKRUPTCY UNDER 1 & 2 WILL. 4.

By 1 & 2 Will. 4, c. 56, s. 1, it is enacted, "That it shall and may be lawful for his Majesty, his heirs and successors, by charter or letters patent under the Great Seal of the United Kingdom of Great Britain and Ireland, to erect and establish a Court of Judicature, which shall be called 'The Court of Bankruptcy,' and by commission under the Great Seal to appoint one person, being a serjeant or a barrister at law of not less than ten years standing, to be the chief Judge of the said Court, and three persons, being serjeants or barristers at law of not less than ten years standing at the bar, or of five years standing at the bar, having previously practised five years as a special pleader below the bar, to be the other Judges of the said Court, and six persons, being barristers at law of not less than seven years standing at the bar, or of four years standing at the bar, having previously practised as a special pleader for three years below the bar, to be called Commissioners of the said Court, and from time to time to supply any vacancy in the number of the said Judges and Commissioners; and the same Court shall be and constitute a Court of law and equity, and shall, together with every Judge and Commissioner thereof, have, use, and exercise all the rights, incidents, and privileges of a Court of Record, or Judge of a Court of Record, and all other rights, incidents, and privileges, as fully, to all intents and purposes, as the same are used, exercised, and enjoyed by any of his Majesty's Courts of law or Judges at Westminster."

The Court of Bankruptcy consisted of four Judges* and six commissioners.

By 1 & 2 Will. 4, c. 56, s. 21, it is enacted, "That in all cases in which power is by this act given to any one of the said Commissioners to act, such power shall and may in like manner be exercised

And have the same powers as those exercised

* By 5 & 6 Will. 4, c. 29, reduced to two.

by a commissioner.

by the said Chief Judge, or by any one of the said other Judges, as occasion may require; and where any such Judge so acting would, in case he were a Commissioner, make any reference or adjournment to a Subdivision Court, such reference or adjournment shall be made by such Judge to the Court of Review instead of to a Subdivision Court."

XXX. OF THE COURT OF REVIEW UNDER 1 & 2 WILL. 4.

(a) HOW MANY JUDGES CONSTITUTE.

By 1 & 2 Will. 4, c. 56, there were three Judges and one Chief Justice*.

By 1 & 2 Will. 4, c. 56, s. 2, it is enacted, "That the said Judges, or any three of them, shall and may form a Court of Review, which shall always sit in public, save and except as may be otherwise directed by this act, or by the rules and regulations to be made in pursuance thereof, and shall have superintendence and control in all matters of bankruptcy, and shall also have power, jurisdiction, and authority to hear and determine, order and allow, all such matters in bankruptcy as now usually are, or lawfully may, be brought by petition or otherwise before the Lord Chancellor, whether such matters may have arisen in the said Court of Bankruptcy or elsewhere, except as is herein otherwise provided; and also to investigate, examine, hear, and determine all such other matters within the jurisdiction of the said Court of Bankruptcy as are by this act, or may be by the said rules and regulations, assigned and referred to the said Court of Review."

(b) OF THE SEAL OF THE COURT.

The Judges of the Court were to cause a seal to be made.

By 1 & 2 Will. 4, c. 56, s. 28, the said Judges of the said Court of Bankruptcy shall cause to be made a seal of the said Court in such form as they shall think fit, and shall cause to be sealed therewith all such proceedings, documents, and copies as by the law now in being, or by this act, or by any rule or order of the said Court, shall be required to be so sealed.

(c) HOW MATTERS ARE TO BE BROUGHT BEFORE THE COURT, AND OF THE PROCEEDINGS THEREIN.

All matters are to be brought before the Court by petition, motion, or special case.

By 1 & 2 Will. 4, c. 56, s. 2, it is enacted, "That all such matters to be heard and determined in the said Court of Review shall be brought on by way of petition, motion, or special case, according to the rules and regulations to be established."

* But 5 & 6 Will. 4, c. 29, reduced the number to two Judges and one Chief Justice; and by 3 & 4 Will. 4, c. 4, s. 41, two Judges of the Court of Bankruptcy to act for the Chief Judge of the Court of Review during his attendance at the Judicial Committee. No Judge has been appointed since the last vacancy.

CHRISTIE v. UNWIN, H. T. 1840. Q. B. 3 P. & D. 204.

AN order was made pursuant to 6 Geo. 4, c. 16, s. 18, to cause a fiat in bankruptcy to be proceeded in, by substituting another debt for that of the petitioning creditor. The order stated, that the debt which it was proposed to substitute, "proved under the fiat," was incurred, not anterior to that of the petitioning creditor, but did not state that the debt was proved before the application to the Court was made. The order recited, that it was made on the hearing of a petition, presented by the creditor, whose debt it was proposed to substitute.

An ambiguity in an order made by the Court of Review to proceed with a fiat cannot be explained by the petition founded thereon.

Per Cur.—This order can only be made on the application of a creditor who has proved his debt, that is, proved it before the application. The order does not say when it was proved. On referring to the petition, it appears, of course, that the debt has been proved before it was presented; but, we think, we cannot take notice of the petition.

(d) ISSUES MAY BE DIRECTED BY.

By 1 & 2 Will. 4, c. 56, s. 4, it is enacted, "That it shall be lawful for the said Court of Review to direct any issue of fact arising therein to be tried by a jury before one of the Judges thereof, (in cases of issues in disputed adjudication, it may be tried before the Chief Judge or any one or more of the other Judges), or before a Judge of Assize, and to issue process to compel the attendance of jurors and witnesses, and to enforce the orders and decrees of the said Court of Review, and to have and to exercise all the powers vested for such purposes in any of his Majesty's Courts of Record at Westminster."

The Court may direct issues to try a question of fact.

By 1 & 2 Will. 4, c. 56, s. 33, it is enacted, "That, after any issue by this act authorized shall be tried, a new trial may be moved in the Court of Review, which new trial shall be granted or refused according to the rules of the common law, and the practice of the Courts of Westminster, in granting or refusing new trials."

And may order new trials.

(e) RIGHT TO MAKE RULES, ORDERS, &c.

By 1 & 2 Will. 4, c. 56, s. 11, it is enacted, "That the Judges of the said Court of Review, with the consent of the Lord Chancellor, shall have power from time to time to make general rules and orders for regulating the practice of the said Court of Bankruptcy, the sittings of the Judges and Commissioners thereof, and the conduct of the other officers, and of the practitioners therein."

The Court may make rules and orders with the consent of the Chancellor.

(f) OF COSTS INCURRED IN.

By 1 & 2 Will. 4, c. 56, s. 5, it is enacted, "That all costs of suit between party and party in the said Court of Review shall be in the discretion of the Court, and shall be taxed by one of the Masters of the High Court of Chancery."

Costs are in the discretion of the Court.

(g) WITHIN WHAT TIME TO APPEAL FROM DECISION OF.

An appeal from the Court of Review must be within one month.

By 1 & 2 Will. 4, c. 56, s. 32, it is enacted, "That, if the Court of Review shall determine in any appeal, touching any decision in matter of law, upon the whole merit of any proof of debt, then the order of the said Court shall finally determine the question as to the said proof, unless an appeal to the Lord Chancellor be lodged within one month from such determination; and, in case of such an appeal, the determination of the Lord Chancellor thereupon shall in like manner be final touching such proof; but if the appeal, either to the Court of Review or the Lord Chancellor, shall be allowed in relation to the admission or refusal of evidence, then and in that case the proof of the debt shall be again heard by the Commissioner or Subdivision Court, and the said evidence shall be then admitted or rejected accordingly."

XXXI. OF THE COURT OF APPEAL UNDER 1 & 2 WILL. 4.

See also *supra*.

From the Court of Review, the appeal is to the Lord Chancellor,

By 1 & 2 Will. 4, c. 56, s. 3, the decision of the Court of Review is subject to an appeal to the Lord Chancellor on matters of law and equity, or on the refusal or admission of evidence only; and in all cases of appeal to the Lord Chancellor, by virtue of this act, such appeal shall be on a special case, and in no other mode whatsoever, except the Lord Chancellor, in any case, otherwise direct, which special case shall be approved and certified by one of the Judges of the said Court of Review in matters arising in the said Court, and by the Judge trying the issue in matters arising out of the trial of issues; and the determination of such Judge, or the settlement of such case, shall be final and conclusive: Provided always, that all appeals to the Lord Chancellor, by virtue of this act, shall be heard by the Lord Chancellor only, and not by any other Judge of the High Court of Chancery.

or House of Lords, and from the Chancellor to the House of Lords.

By 1 & 2 Will. 4, c. 56, s. 37, it is enacted, "That, in case the Lord Chancellor shall deem any matter of law or equity brought before him by way of appeal from the Court of Review to be of sufficient difficulty or importance to require the decision of the House of Lords, or in case both parties in any proceeding before the Court of Review shall desire that any such matter may be determined, in the first instance, by the House of Lords, and not by the Lord Chancellor, then and in such case the Lord Chancellor, or the Court of Review, may direct the whole facts whereupon such question of law or equity shall arise to be stated, in the form of a petition of appeal to the House of Lords; and the party appealing may carry such appeal to the House of Lords in like manner as other appeals are preferred to that House: Provided always, that the cases to be lodged by the parties in the House of Lords shall be confined in matter of fact, in cases of appeal from the Lord Chancellor, to setting forth the special case brought up to the Lord Chancellor from the Court of Review, and, in cases of appeal from the said Court of Review, to setting forth a special case, to be approved in manner hereinbefore provided touching appeals to the Lord Chancellor, and to such arguments on the point of law as the parties may be advised to state."

XXXII. OF THE SOLICITOR.

(a) APPOINTMENT OF*.

(b) DUTIES† AND RIGHTS OF‡.

GILLETT v. RIPPON, M. T. 1829. N. P. 1 M. & M. 406.

THIS was an action on a guarantee to indemnify the plaintiff against the expenses of a commission of bankruptcy, to be sued out by the plaintiff as petitioning creditor, and to be conducted by the defendant as attorney. For the defendant, it was contended, that the action was not maintainable, the agreement being against public policy; and *Murray v. Reeves*, (8 B. & C. 421), was relied on.

Lord Tenterden, C. J., reserved the point.

See *Gilmour v. King*, 1 C. & M. 616; S. C. 3 Tyrw. 586.

Qu. if solicitor can guarantee costs of commission on condition of being employed.

(c) LIABILITY OF‡.

(d) BILL OF COSTS.

TAYLOR v. M'GAUGAN, M. T. 1829. N. P. 4 C. & P. 96.

PER *Abbott*, C. J.—A solicitor to a commission of bankruptcy may maintain an action for the amount of his bill up to the choice of

The 14th sect. of 6 Geo. 4, c. 16 §, as to

* The majority in number of the assignees are entitled to nominate the solicitor to the commission, and to regulate the removal or continuance of him. (1 Rose, 207; 2 Rose, 66). It is no objection that he is also assignee. (16 Ves. 166). But he cannot be solicitor for the assignees and bankrupt also. (14 Ves. 513).

† In suspicious cases, the Court of Bankruptcy will require him to satisfy the Court that he has made due inquiry with respect to the effects, the trading, and other material circumstances. (7 Ves. jun. 407; 6 Ves. jun. 3; 1 Ves. jun. 394). But if the application for issuing the commission be so urgent that the attorney has not time to make such inquiries, he will not be liable to costs. (15 Ves. jun. 63). It is the duty of the solicitor not to buy the bankrupt's estates for his own benefit; (8 Ves. jun. 227); and he cannot even purchase for a client. (10 Ves. jun. 381). And if he be removed from his office of solicitor, he cannot purchase, unless with the consent of the creditors. (8 Ves. jun. 337). The proper mode of enabling him to become purchaser is by application to the Court. (5 Ves. jun. 681).

‡ By 1 & 2 Will. 4, c. 56, s. 10, it is enacted, "That all attorneys and solicitors of any of the Superior Courts of law or equity at Westminster may be admitted and have their names enrolled in the said Court of Bankruptcy, without any fee or charge other than such as shall be allowed by this act, or any rule or regulation to be made in pursuance thereof, and may appear and plead in any proceedings in the said Court without being required to employ counsel, (except in proceedings before the said Court of Review, and upon the trial of issues by jury); and in case any person, not being an attorney or solicitor duly admitted as aforesaid shall practise in the said Court of Bankruptcy as an attorney or solicitor, he shall be deemed guilty of a contempt of the said Court, and be liable to all the penalties incident thereto, on complaint thereof made to the Court of Review; and that all the laws and statutes now in force concerning attorneys and solicitors shall extend to attorneys and solicitors practising in the said Court of Bankruptcy."

§ By sect. 14, it is enacted, "That all bills of fees or disbursements of any solicitor or attorney, employed under any commission, for business done after the choice of assignees, shall be settled by the commissioners, except that so much of

taxing solicitor's bill, only applies to proceedings after the choice of assignees.

assignees, without having had his bill taxed by the commissioners under sect. 14 of the Bankrupt Act, 6 Geo. 4, c. 16, that provision applying only to cases between the assignees and the estate.

XXXIII. OF THE MESSENGER.

(a) DUTIES AND LIABILITY OF*.

SLY *v.* STEVENSON, 1826. N. P. 2 C. & P. 464.

The warrant to search under 6 Geo. 4, c. 16, must be given to the messenger, and not to a constable †.

TRESPASS. A warrant had been granted to the defendant, who was a constable, under sect. 29 of 6 Geo. 4, c. 16, which enacts, "That, in all cases where it shall be made to appear, to the satisfaction of any justice of peace in England or Ireland, that there is reason to suspect and believe that property of the bankrupt is concealed in any house, premises, or other place not belonging to such bankrupt, such justice of peace is hereby directed and authorized to grant a search warrant to the *person so deputed by the commissioners as aforesaid*; and it shall be lawful for such person to execute the same in like manner; and such person shall be entitled to the same protection as is allowed by law, in execution of a search warrant for property reputed to be stolen and concealed." From this section it was argued, that the person alluded to as the person deputed by the commissioners is the messenger.

Best, C. J., held, that the plaintiff was entitled to a verdict, as the warrant should not have been granted to the defendant, but to the messenger.

(b) RIGHTS OF.

BURWOOD *v.* KANT, M. T. 1825. N. P. 2 C. & P. 123.

Petitioning creditor is liable to the messenger, though his fees are to be paid

THE defendant was the petitioning creditor, and also the assignee; and the plaintiff's demand consisted of a sum of 13*l.* 2*s.* 8*d.* due to him, as messenger under the commission, before the choice of assignees. The plaintiff's counsel argued, that, if these charges

such bills as contain any charge respecting any action at law, or suit in equity, shall be settled by the proper officer of the Court in which such business shall have been transacted, and the same, so settled, shall be paid by the assignees to such solicitor or attorney: Provided, that any creditor who shall have proved to the amount of 20*l.* or upwards, if he be dissatisfied with such settlement by the commissioners, may have any such costs and bills settled by a Master in Chancery, who shall receive for such settlement, and the certificate thereof, 20*s.* and no more." It has been doubted, whether the bill could be taxed after action brought. (2 Campb. N. P. C. 275). But now it is settled that it may. (1 Stark. 279, n.).

* The messenger in bankruptcy is to enter and seize, at his own hazard, the property of the bankrupt; but if he enters the house, and seizes the property of another, acting under authority, he cannot be turned out, but the party must take his remedy by law. (17 Ves. 59; 1 Atk. 136).

† If the messenger of the commissioners of bankrupt take possession of former property of the bankrupt under an impression that the assignment was fraudulent, such fraud, though proved, is no defence to an action of trespass by the assignee against the messenger, without proving an act of bankruptcy committed. (6 Taunt. 540; 2 Marsh. 233).

were not paid out of the estate, the messenger might still recover them against the petitioning creditor. by assignees out of assets*.

But *Abbott*, C. J., held the plaintiff entitled to recover.

See *Hartop v. Jukes*, 2 M. & S. 438.

(c) OBSTRUCTION OF†.

XXXIV. BANKRUPTCY ABROAD‡.

XXXV. OF THE BANKRUPT.

1st.—BEFORE HE HAS OBTAINED HIS CERTIFICATE.

(a) DUTIES OF.

1. *To Surrender*§.

REX v. BURRSTON, 1820. N. P. 1 *Gow*, 210.

AN indictment against a bankrupt for concealing his effects stated, that the notice required by the statute 5 Geo. 2, c. 30, had been personally served on the bankrupt. It was contended, that, as the statute gives two means of service, one at the usual place of

In an indictment against a bankrupt for not appearing pursuant to

* The messenger may maintain an action for his bill against the petitioning creditor up to the time of the choice of assignees; (*Hartop v. Jukes*, M. T. 1814, K. B., 2 M. & S. 438); and the solicitor is not liable to the messenger, except by special agreement; (*Ibid.*, 12 Ves. 353); and the former is liable, notwithstanding the solicitor may have made himself responsible. (*Hart v. White*, M. T. 1826, N. P., Holt, 376). The messenger is entitled to expenses incurred in defending the commission; (12 Ves. 353); and it is no objection to an application by a messenger, that the assignees may be directed to pay him his fees, that he has neglected to make a demand upon them till after final dividend, since they must be presumed to know of his having such a claim, and ought not to have distributed the funds without reserving sufficient to satisfy it. (1 Rose, 499).

† Obstructing a messenger in the execution of his warrant is a contempt of Court. (1 Rose, B. L. 1).

‡ Assignees under a commission abroad may sue here for a debt due to the bankrupt. If the proceedings under a commission abroad are as extensively operative as under a commission in England, it seems that both may exist together, (3 V. & B. 99; see 2 Rose, 166; 3 V. & B. 101), though it seems that an English commission invalidates a subsequent sequestration in Scotland. (2 Rose, 233; 3 V. & B. 94; 1 Rose, 462). The plaintiffs had been bankrupts in France, and, by a *concordat*, resumed their business in France. Before the bankruptcy, the defendant became indebted to them. In an action brought by them in England:—Held, that shewing that the action was brought with the assent of the commissioners named in the *concordat* was sufficient. (*Parke, J.—Orr v. Browne*, H. T. 1833, N. P., 5 C. & P. 414).

§ By 5 Geo. 2, c. 30, and 6 Geo. 4, c. 16, the bankrupt should surrender at the third meeting, (now the second meeting, 1 & 2 Will. 4, c. 56); and, if apprehended, to have the same benefit on conforming as if he had surrendered. Formerly, the commissioners used to certify to the Judges, &c., who, upon such certificate, granted a warrant for apprehending the bankrupt; but this clause is repealed by 6 Geo. 4.

By 6 Geo. 4, c. 16, s. 113, the time may be extended as often as the Court shall think fit.

notice, the exact mode of serving the notice must be shewn*.

abode, and the other personal, if the bankrupt be a prisoner, the indictment should have been so framed.

And *Best, J.*, thought the objection well founded.

2. To make Discovery of his Effects†.

REX v. JONES, M. T. 1832. K. B. 1 N. & M. 78; S. C. 4 B. & Ad. 328.

An indictment for concealing property must state the act of bankruptcy, trading, &c. ‡.

AN indictment for conspiring to conceal the bankrupt's property stated that a commission issued, under which the party was duly found and declared to be a bankrupt, without further averring the trading, petitioning creditor's debt, &c.

The Court held the indictment insufficient; it being, since 6 Geo 4, c. 16, still necessary, in an indictment for conspiring to conceal goods of the bankrupt, to aver and prove the facts, shewing the act to be unlawful.

3. To deliver up Books‡.

4. To attend the Assignees §.

(b) RIGHTS OF.

1. To hold Offices||.

* By 6 Geo. 4, c. 16, s. 112, a bankrupt who does not surrender in forty-two days after notice, &c., is guilty of felony.

A bankrupt cannot be indicted for not surrendering, if he be in prison, even though collusively, merely because he has not given notice of his imprisonment, or applied to be brought up, or to have the time enlarged. (*Littledale, J.—Rex v. Mitchell*, Sum. Ass. 1829, N. P., 4 C. & P. 251).

† By 6 Geo. 4, c. 16, bankrupts, not making discovery of their estate and effects, shall be deemed felons.

The 6 Geo. 4, c. 16, s. 120, applies only to parties assisting the bankrupt in the concealment of his goods, and not to a case of a debtor and creditor. The latter, however, might come within the act, although a fraudulent preference is intended. A separate penalty is not recoverable for each distinct act of concealment. (*Brooks v. Glencross*, 1831, N. P., 2 M. & Rob. 62).

‡ By the 5 Geo. 2, c. 30, s. 1; 1 Geo. 4, c. 115; and 6 Geo. 4, c. 16, s. 112, it is enacted, "That if any such bankrupt shall not, when examined by the said commissioners, deliver up to them all his estate, and all his books, papers, and writings, relating thereunto, as be in his possession, custody, or power, (except the necessary wearing apparel of himself, his wife, and children), every such bankrupt shall be deemed guilty of felony, &c."

Under this statute, a bankrupt cannot be indicted for concealing his books until after his last examination. And to support such indictment, what the bankrupt said at his examination cannot be proved by parol evidence. (*Parke, J.—Rex v. Walters*, 1831, N. P., 5 C. & P. 138). On an indictment against a bankrupt for not disclosing his effects, the balance sheet given by him on oath under his commission is not evidence against him. (*Patteson, J.—Rex v. Britton*, Sum. Ass., 1833, N. P., M. & Rob. 297). The indictment may be in Middlesex, if evidence can be given of actual concealment there. (*Rex v. Evans*, MS).

§ By 5 Geo. 2, c. 80, and 6 Geo. 4, c. 16, the bankrupt is bound to attend the assignees, and if he refuses so to do, he is liable to be committed.

|| A bankrupt has a right to act as executor, (*Skin. 229*); or trustee, (*1 Mont. B. L. 424*); or overseer, (*1 T. R. 369*); or committee of a lunatic, (*3 Ves. 2*); or as an attorney; (*1 Cooke, B. L. 428*); but not as prochein amy, (see *Watson v. Fraser*, 8 M. & W. 600).

REX v. CHITTY, M. T. 1836. K. B. 1 N. & P. 78.

UPON a quo warranto, the disqualification relied upon was, that the defendant, who claimed to be a councillor of the borough of B., under the Municipal Corporation Act, was at the time of his election an uncertificated bankrupt.

Per Cur.—It is sufficient for us to say, that, by the plain words of the 56th sect. of 5 & 6 Will. 4, c. 76, the disqualification is confined to the case of a man becoming a bankrupt after he has been elected. And it is not for us to carry disqualifications beyond the words of the statute.

An uncertificated bankrupt may be elected as a councillor under the Municipal Corporation Act.

2. To a Maintenance*.

3. To bring Actions.

1.—For a malicious Fiat.

COTTON v. JAMES, T. T. 1830. K. B. 1 B. & Ad. 128.

THIS was an action for maliciously suing out a commission of bankrupt against the plaintiff, without probable cause. The defendant, on the 10th of October, 1828, sued out a commission against the plaintiff, under which he was adjudged a bankrupt, and a messenger seized part of his effects. For this seizure the plaintiff brought an action of trespass against the defendant; he justified under the commission; the plaintiff denied the bankruptcy: and, issue being joined on this point, the cause was tried before Lord Tenterden, at the sittings before Hilary Term, 1829, when the jury, under his Lordship's direction, found a verdict for the plaintiff; and they assessed the plaintiff's damages at 400*l*. The defendant afterwards caused the commission to be superseded at his own expense.

In an action for maliciously suing out a commission of bankrupt, if the plaintiff shews that the commission was superseded, and an action of trespass brought by him against the defendant for seizing his property, the onus of proving probable cause lies on the defendant.

Per Cur.—The question of probable cause, arising upon the facts proved or admitted, is a question for the Court; and in general, the plaintiff must give some evidence, shewing the absence of probable cause. But such evidence is, in effect, the evidence of a negative; and very slight evidence of a negative is sufficient to call upon the other party to prove the affirmative, especially where the nature of the affirmative is such as to admit of proof, by witnesses, and cannot depend upon matters lying exclusively within the party's own knowledge, as may sometimes happen in cases of criminal prosecution. In the present case, the adjudication of the commissioners cannot have been made on the testimony of the defendant, who was the petitioning creditor. On the trial, it appeared, that the commissioners had adjudged the plaintiff to be a bankrupt; and that he had afterwards brought an action of trespass against the defendant for taking his goods, in which the defendant pleaded his justification under the commission, and issue was joined on the question, whether the plaintiff had become bankrupt. This issue was found for the plaintiff, and a verdict passed for him. Soon after the verdict, the defendant applied to the Great Seal, and superseded the commission at his own expense. We consider this was sufficient *prima facie* evidence of the want of probable cause for suing out the commission, to call upon the defendant to give some proof of the affirmative, viz. the existence of some probable cause.

* By 6 Geo. 4, c. 16, s. 114, the bankrupt, until his last examination, is entitled to a maintenance.

WHITWORTH v. HALL, T. T. 1831. K. B. 2 B. & Ad. 695.

But the declaration must state that the commission was superseded*.

THIS was an action on the case for maliciously suing out a commission of bankrupt against the plaintiff. The case for the plaintiff being opened by his counsel, it was objected, that the action could not be maintained, inasmuch as it was not averred in the declaration, nor proved at the trial, that the commission had been superseded.

Per Cur.—The declaration must aver that the commission has been superseded; and if the plaintiff on the trial is not prepared to prove the fact, he must be nonsuited, although the defendant passed by the opportunity of demurring; for, after verdict, it would be presumed that such fact had been proved on the trial.

2.—Of Payment to the Assignees after Action brought.

CROFTON v. POOLE, M. T. 1830. K. B. 1 B. & Ad. 568.

An action by an uncertificated bankrupt may be defeated by a payment to the assignees after the commencement of the action.

ACTION for work and labour. The debt was not disputed, but the defence offered was, that the plaintiff was an uncertificated bankrupt; and that the defendant, since the commencement of this action, had paid the plaintiff's assignees the amount of the debt. In support of this case, Mr. Nias, the attorney for the present defendant, was called; he had also been the attorney to the commission against the plaintiff. He produced the commission and the proceedings thereunder. He stated, that the plaintiff had applied to him for a list of the creditors who had proved their debts, in order that he might apply to them to sign his certificate, and had also requested him to apply for the signature of the petitioning creditor, expressing his hope that the witness would do so, as, without that signature, he would not be able to procure the certificate. He also proved, that, after the action was brought, the defendant paid the amount of the present debt to the assignees. The plaintiff had never obtained his certificate.

Per Cur.—Then there can be no doubt that this right of action passed to the assignees under the words of the 63rd section of the Bankrupt Act,—“all the present and future personal estate of such bankrupt, all debts due or to become due to the bankrupt.” Then, the assignees, having a right to interfere, and having done so, the debt which was theirs has been satisfied, and they are contented. We think such a defence is a good answer to the action under the general issue.

3.—Of pleading Plaintiff's Bankruptcy.

GWINNESS v. CARROLL, E. T. 1828. K. B. 2 M. & R. 132; S. C. 1 B. & Ad. 459.

A plea in bar of plaintiff's bankruptcy, must state plainly and affirmatively that the plaintiff was a bankrupt.

THE defendants pleaded in bar, “that a commission of bankrupt issued against plaintiff, under which he was duly found, adjudged, and declared a bankrupt,” without alleging that he was in fact a bankrupt.

Per Cur.—The plea is bad. Such a plea should state the trading, the act of bankruptcy, and the petitioning creditor's debt.

* Proof merely that a commission has been superseded is not sufficient to shew the want of probable cause, in an action for maliciously suing out a commission of bankruptcy. (*Tindal, C. J.—Hay v. Weakley*, H. T. 1832, N. P., 5 C. & P. 361).

STAPLES v. HOLDSWORTH, M. T. 1837. C. P. 6 D. P. C. 196; S. C. 4 Bing. N. S. 143; S. C. 5 Scott, 432.

THE defendant, under the usual terms of pleading issuably, re-joining gratis, and taking short notice of trial, in addition to non assumpsit pleaded the bankruptcy of one of the plaintiffs since the commencement of the action; and the latter plea having been directed to be struck out by a Judge at chambers, as incompatible with the order to plead issuably, on a rule for restoring the plea, on the ground that it was an issuable plea—

Per Cur.—The question is, whether the proposed plea is issuable, within the meaning of a Judge's order, and we are of opinion that it is not. The meaning of the term, "pleading issuably," as stated by Lord Kenyon, is not merely pleading a plea on which issue may be taken, but such a plea as goes to the merits; and the substantial merits of the action in this case are, whether the defendant ever entered into the alleged contract, and whether he had broken it. But the effect of the proposed plea, if allowed, will be merely to turn the plaintiffs round, in order that the same question may be litigated in another action.

Under an order to plead issuably, defendant cannot plead the bankruptcy of one of the plaintiffs after action brought.

WILLIS v. ALLEN, E. T. 1839. C. P. 7 Scott, 474; S. C. 5 Bing. N. S. 465.

IN an action for goods sold and delivered, the defendant, being under terms to plead issuably, pleaded two pleas: one of which was, that, before the commencing of the action, and after the accruing of the debt, the plaintiff had become bankrupt. The plaintiff thereupon signed judgment, on the ground that this was not an issuable plea.

But, plea of plaintiff's bankruptcy before action brought is an issuable plea.

Per Cur.—The present is, in our opinion, distinguishable from the case of *Staples v. Holdsworth*, supra. There, the bankruptcy of one of the plaintiffs occurred after the action brought, and it was attempted to set it up as an answer, whereas the debt arose here before action brought.

The rule for setting aside the judgment was made absolute.

4.—Of the Costs and Security for.

JONES v. TURNBULL, E. T. 1837. Ex. 2 M. & W. 601; S. C. 5 D. P. C. 591.

AN uncertificated bankrupt brought an action for work and labour, &c., as a builder, which was referred; and the arbitrator awarded in favour of the plaintiff, and the assignees claimed the sum awarded. Upon an interpleader rule obtained by the defendant—

Per Cur.—We are disposed to think that the attornies have a lien for all their costs, both of the action and of the award. We need not now discuss the surplus. It is not fair that the assignees should stand aloof and wait until the award is made, and then step in and claim the benefit of it, unless they pay the costs of it. Let the bill of the attornies be taxed and paid.

Where a bankrupt sues for a debt, and the assignees interfere to have the benefit, they must pay the costs due to the bankrupt's attorney*.

* And where an action was brought in Common Pleas by an uncertificated bankrupt after nonsuit in King's Bench for same cause, the Court stayed the proceedings until the costs in the first action were discharged. (*Crawley v. Impey*, C. P., 8 Taunt. 407; S. C., 2 Moore, 460).

MANLEY v. MAYNE, M. T. 1828. K. B. 3 M. & R. 381.

A bankrupt must find security for costs; but upon the terms of his bankruptcy not being pleaded.

RULE to shew cause why the plaintiff, a bankrupt, should not find security for costs. On shewing cause, counsel admitted that he could not resist the rule, but submitted that it should be made a term that the defendant should not plead the bankruptcy of the plaintiff.

Per Cur.—It would be unreasonable that the defendant should obtain security for costs on the ground that the action is prosecuted not by the plaintiff himself, but by his assignees, and then turn the plaintiff round on an objection which is personal.

BECKHAM v. KNIGHT, M. T. 1837. C. P. 6 D. P. C. 227; S. C. 3 Scott, 336; S. C. 4 Bing. N. S. 74, 243.

But where the cause is staid by demurrer, and the plaintiff, a bankrupt, obtains his certificate, he is not bound to give security for costs, if the assignees refuse to interfere.

ON an application to compel the plaintiff to give security for costs, it appeared that the action was commenced in January, and on the 28th of that month a declaration was delivered. The defendant demurred to the declaration on the 21st February; and there was a joinder in demurrer on the 6th April; but subsequently to this, in the month of June, the plaintiff became a bankrupt, and obtained his certificate on the 23rd September, before the commencement of the present term.

Per Cur.—After an issue in law has been joined in the action the plaintiff becomes bankrupt; and not until after he has obtained his certificate is any application made to the Court for security for costs. It might be, that, if the case rested there, the parties would have been obliged to give security. But there is another circumstance, namely, that it is desired that the assignees come in and interfere with the action. It seems to us, then, to be a case which may be considered to be within the circumstances and principle of *Snow v. Townsend*, as reported in 1 Marshall, 477. The assignees having declined to sue, the Court refused to set aside the proceedings in the action, or to compel the plaintiff to give security for costs.

4. To prefer Indictments*.

(c) PRIVILEGES OF.

RILEY v. BYRNE, T. T. 1831. K. B. 2 B. & Ad. 779.

A bankrupt, who is in custody for non-payment of costs under an attachment, may be discharged, as the debt is proveable.

ACTION for libel. Cause at issue. The parties then compromised, by defendant making an apology and agreeing to pay costs as between attorney and client. That arrangement was turned into a rule of court and the costs taxed. The defendant paid a part, and, not paying the remainder, he was taken under an attachment for contempt. While he was still in custody, he became bankrupt, and obtained his certificate. A rule nisi was thereupon obtained to discharge him out of custody, as to the present action.

Per Cur.—We think the undertaking of the defendant did, in substance, constitute a debt; and that the case was not merely that of an attachment for disobedience to a rule of Court. The defendant's promise was founded upon good consideration—the forbear-

* If goods be stolen from an uncertificated bankrupt, it may be alleged in the indictment for the felony that they were his property. (*Webb v. Fox*, 7 T. R. 391).

ance of the suit. The Master's allocatur was in the nature of an award, and liquidated the damages; so that, before the bankruptcy, the debt was fully ascertained.

BARROW v. POILE, H. T. 1831. K. B. 1 B. & Ad. 633.

UPON a rule to shew cause why a writ of fi. fa. should not be set aside, it appeared that the goods of a bankrupt, which he had acquired after his bankruptcy and certificate, had been taken in execution upon a pre-existing judgment.

The Court set aside the execution on motion, and refused to put the bankrupt to the expense of an *audita querela*, notwithstanding it was urged that the bankruptcy was collusive, and that the assignees, in trying the validity of the bankruptcy, would fail to establish the fact of the trading.

And an execution against his future effects will be set aside, though a doubt exist as to the validity of the trading.

SADLER v. CLEAVER, T. T. 1831. C. P. 7 Bing. 769; S. C. 5 M. & P. 706.

PENDING an action, and before judgment, the defendant became a bankrupt and obtained his certificate. The plaintiff having given notice of trial, application was made to stay proceedings. It was contended that the Court has no right to interfere, as the 6 Geo. 4, c. 16, s. 126, only authorizes the Court to discharge a bankrupt taken in execution.

Per Cur.—We think we are bound to stay the proceedings; because, if they go on, that will come to execution; and where is the difference between now and after execution?

Proceedings against bankrupts under the 120th section of 6 Geo. 4, c. 16, may be stayed before judgment.

DAVIS v. SHAPLEY, E. T. 1831. K. B. 1 B. & Ad. 54; *semb. overruling* AUSTIN v. DENNIFORD, E. T. 1827. K. B. 9 D. & R. 600.

THE defendant had been once a bankrupt, and had obtained his certificate; he became bankrupt again; but did not pay 15s. in the pound. His goods being taken in execution, motion was made to set it aside; but, the assignees under the second commission refusing to interfere—

The Court said, they did not see how they could prevent a creditor from enforcing his judgment; and refused the rule.

An execution against the effects of a bankrupt, if he does not pay 15s. in the 1*l*. under a second commission, will not be set aside.

(d) DISABILITIES OF.

1. *To be discharged under the Insolvent Act*.*
2. *To retain Property against his Assignees†.*

3. *To execute a Power of Appointment.*

BADHAM v. MEE, M. T. 1831. C. P. 1 M. & Scott, 14; S. C. 7 Bing. 695.

MARRIAGE settlement to the use of M. for life; remainder to the use of trustees to preserve; remainder to the use of such one

A bankrupt, who possesses a

* A bankrupt cannot be discharged under the Insolvent Act. (7 Mod. Rep. 314). But see 4 Geo. 4, c. 16, s. 64.

† Furniture left in the possession of an uncertificated bankrupt for a valuable consideration paid to his assignees by a third person, may be afterwards reclaimed by them, the bankrupt only possessing a defeasible property in the goods. (3 B. & Ald. 225).

power of appointment under a marriage settlement, is disqualified by his bankruptcy from making it.

or more of the sons of M. on the body of the wife, and for such estates, &c., as M. should, by deed or will, appoint; remainder to use of first son and other sons of M. on the body of the wife in tail; with the ultimate remainder to the use of the heirs of M. The marriage takes place; there are two sons; the wife dies; a commission of bankruptcy is issued against M., and the commissioners execute bargain and sale to the assignees, who, with M., by lease and release, convey to P. M. in fee. Afterwards, M., by deed poll, appoints in favour of his elder son, R. M., in fee.

The Court held, that R. M. took no estate under the appointment, but took an estate tail under the settlement.

4. To dispute the Validity of the Commission or Fiat.

HEANE *v.* ROGERS, E. T. 1829. K. B. 9 B. & C. 577.

A bankrupt is not estopped from disputing the commission by assisting in disposing and allotting his property, when about to be sold by the assignees*.

ACTION by plaintiff, an alleged bankrupt, to try validity of the commission. It was contended, that he was estopped, because, when the goods were sold by the defendants as assignees under the commission, the plaintiff assisted in assorting and lotting them; but the witness who proved this, admitted that what the plaintiff thus did was nothing more than an endeavour to assist in causing the goods to be sold to the best advantage.

The Court considered that neither of these acts amounted to an estoppel, the first being merely in the assorting and allotting of the goods, that they might be sold to the best advantage; the second, because the doctrine of estoppel only applies to privies, and that, although, as between the bankrupt and his landlord, he could not deny his bankruptcy, yet, as regards the defendant, he was not precluded from disputing the commission.

See 2 G. & J. 183; 6 Esp. 61; 5 B. & C. 153.

WATSON *v.* WACE, H. T. 1826. K. B. 5 B. & C. 153; S. C. 7 D. & R. 633; S. C. 2 C. & P. 171.

But a person who has applied to be discharged out of custody, on the ground of bankruptcy, is precluded from afterwards disputing the commission†.

THE bankrupt had applied to a Judge, and been discharged out of custody, on the ground of his detaining creditors having proved under his commission.

The Court held, that he could not afterwards, in a court of law, dispute its validity.

See *Goldie v. Gunston*, 4 Campb. 381.

MOTT *v.* MILLS, M. T. 1827. N. P. 3 C. & P. 197.

Semb. *contra*,

TROVER for deeds, &c., to try the legality of the commission

* In an action to try the validity of a commission, the correctness of the bond to the Chancellor cannot be impeached. (*Folks v. Scudder*, T. T. 1827, N. P., 3 C. & P. 232).

† So, a bankrupt, who goes round to his creditors to solicit their votes in the choice of assignees, and acquiesces under the commission during three years, (6 Esp. 20), or who has obtained his discharge from several actions on the plea of bankruptcy, (4 Campb. N. P. C. 381), or a person who has been declared a bankrupt and acted in the sale of his effects, is estopped from bringing an action to try the validity of the commission. (6 Esp. N. P. C. 61).

issued against the plaintiff. It was objected, that he was estopped, because he had insisted on his discharge out of custody under the 6 Geo. 4, c. 16, s. 39. under 6 Geo. 4, c. 16, s. 9*.

But *Park, J.*, overruled the objection, and thought it no dispensation.

See 4 *Campb.* 381; 5 *B. & C.* 153; *S. C.* 7 *D. & R.* 633.

CHAMBERS v. BERNASCONI, E. T. 1830. C. P. 6 *Bing.* 498;
S. C. 4 *M. & P.* 201.

THE plaintiff, an uncertificated bankrupt, with a view to trying the validity of the commission, sued his assignees in assumpsit for money had and received, and held them to bail in a large sum. The Lord Chief Justice made an order at chambers for cancelling the bail-bond, on the defendant's entering a common appearance. On motion to rescind the order—

Per Cur.—As an uncertificated bankrupt can have no property, no right of action, even against third persons, unless with the assent of his assignees, how can he have any as against the assignees themselves? It should be remembered, also, that, before he was declared a bankrupt, the facts necessary to establish the bankruptcy must have been deposed to on oath by third persons, and the bankruptcy declared by the adjudication of commissioners sitting under the authority of an act of parliament; and it seems unreasonable, that, upon the single and unconfirmed affidavit of the bankrupt himself, all that has been so done should be taken to be without foundation; and, looking at the consequences of allowing such a proceeding, we think they would be most injurious to the public; for what respectable person would become assignee to a bankrupt's estate, if, at any moment of time, he was liable to be arrested for the full amount of the assets realized, merely because the bankrupt believed, to which belief his wishes would lead him, that the commission was invalid?

Where, before 1 & 2 Vict. c. 110, the bankrupt arrested his assignee, in an action to try the validity of the commission, the Court discharged him on common bail.

5. To plead that a new Security was given.

DAVIS v. HOLDING, H. T. 1840. Q. B. 3 *P. & D.* 413.

To an action of assumpsit for 200*l.* for goods sold and delivered, and upon an account stated, the plea set out an agreement (under sect. 8 of 6 Geo. 4, c. 16) between the plaintiff, who was the petitioning creditor, and the defendant, against whom a fiat had issued before any adjudication of bankruptcy, to deliver, and the delivery of two bills of exchange, by the defendant, as a security to the plaintiff for a part of his debt, in consideration of his abandoning his proceedings under the fiat. The plea did not aver, that the plaintiff had or could have received more in the pound than the other

A plea, that, after debt was incurred, the defendant became bankrupt, and before adjudication plaintiff agreed to abandon proceedings in consideration

* But semb., a bankrupt is precluded from disputing the commission against him, if he seek protection from arrest in consequence of that commission, or if he apply to the Lord Chancellor for his certificate, even though he do not obtain it; for the application alone is an acquiescence under the commission. (*Dennett v. Kirkpatrick*, 5 *Law J.*, K. B., 67). A bankrupt is not entitled to his certificate, if in one day he has lost 20*l.* by betting, though he won a greater sum by other bets on the same day. (*In re Jones*, 2 *G. & J.* 329).

of a bill of exchange as a security for part of his debt:—
Held, a bad plea.

creditors, nor that the defendant had not assets to satisfy all the creditors, nor that the original fiat had been proceeded with, or that any other had issued. Upon special demurrer to the plea—

The Court held, that it was no answer to the action.

(c) LIABILITIES OF.

1. With respect to Leases.

SLACK *v.* SHARP, T. T. 1838. K. B. 3 N. & P. 390; S. C. 8 A. & E. 366.

A tenancy by parol is within the 6 Geo. 4, c. 16, s. 75*.

THE bankrupt was tenant from year to year, at a rent payable on the 9th October and 6th April, and became bankrupt during a current half year, and the assignees having declined, the bankrupt, on the 5th April, delivered up the possession under the 6 Geo. 4, c. 16, s. 75.

The Court held, that a tenancy by parol was within the statute, and the rent not accruing due until the 6th April, he was not liable in use and occupation for the time he occupied *pro ratâ*.

MANNING *v.* FLIGHT, H. T. 1832. K. B. 3 B. & Ad. 211.

The 6 Geo. 4, c. 16, s. 75, only discharges the bankrupt from subsequent payment of rent or performance of the covenants, but does not terminate the lease.

By the 75th section of the 6 Geo. 4, c. 16, any bankrupt, entitled to any lease or agreement for a lease, if the assignees decline the same, shall not be liable to pay any rent after the date of the commission, or to be sued for any subsequent non-performance of the covenants, &c., in case he deliver up the lease or agreement to the lessor, or such person agreeing to grant such lease, within fourteen days after he shall have had notice that the assignees shall have declined. In an action of covenant against the original lessee, plea, the assignment and subsequent bankruptcy of the assignee, refusal of his assignees to accept the lease, and delivery of it up to the plaintiffs entitled to the reversion: on demurrer—

The Court held the plea bad, because the 6 Geo. 4, c. 16, s. 75, only discharges the bankrupt from any subsequent payment of rent or performance of covenants, but does not put an end to the lease.

WORTHINGTON *v.* PRINCE, T. T. 1835. Ex. 4 D. P. C. 243.

A plea by defendant, bankrupt, that rent became due after his bankruptcy, that the assignees declined the lease, but that the landlord accepted it:—
Held, a frivolous plea.

JUDGMENT was signed for want of plea, in an action for use and occupation, but was set aside on an affidavit of merits, and on terms of pleading issuably, &c.; and that the defendant pleaded, that the rent claimed became due under a lease, and that, after a fiat issued against him, he had been declared bankrupt; and that his assignees, upon application, declined the lease; and that he thereupon tendered the lease and the possession to the landlord, who accepted them. On motion for judgment for want of a plea—

The Court held, that it was a frivolous plea, and compelling the plaintiff to demur, and not within the terms of the rule; and the rule for judgment as for want of plea was made absolute.

* See ante, Div. XVII. Of the Assignees, "Duties of."

DOE *d.* BARING *v.* ROE, H. T. 1838. C. P. 6 D. P. C. 456.

RULE for judgment against the casual ejector, upon a service of the declaration upon two of the tenants, and upon the officer in possession, under a fiat of bankruptcy against a third, and upon his official assignee, but not upon the other two assignees—

The Court held it to be good, and judgment against the casual ejector was allowed.

In ejectment against a bankrupt, service of notice on the messenger and official assignee sufficient.

2. With respect to Indictments.

1. *For not Surrendering.* See ante, p. 179.

2. *For Concealing his Effects.* See ante, p. 180.

3.—*For a Conspiracy**.

2nd.—AFTER HE HAS OBTAINED HIS CERTIFICATE.

(a) RIGHTS OF.

1. To plead his Bankruptcy†.

SHEEN *v.* GARRETT, T. T. 1830. C. P. 4 M. & P. 525; S. C. 6 Bing. 686.

PLEA, that, before the suing out of the original writ of the plaintiff, against the defendant in this behalf, to wit, on &c., at &c., the defendant became bankrupt within the true intent and meaning of the statute then and still in force concerning bankrupts; that the judgment in the said declaration mentioned was obtained by the plaintiff against the defendant for certain debts and demands, in respect of which the plaintiff was entitled to prove, by virtue of the said statute, as a creditor under a certain commission of bankruptcy afterwards duly issued against the defendant; that the aforesaid several debts and demands accrued and were due from the defendant to the plaintiff before and at the time when the defendant became bankrupt as aforesaid, to wit, at &c.; and this he, the defendant, is ready to verify, wherefore he prays judgment, if the plaintiff ought to have or maintain his aforesaid action against him; and to this plea the plaintiff demurred.

A plea of bankruptcy must, in conformity with the 6 Geo. 4, conclude to the country.

Per Cur.—It is true, that the 6 Geo. 4, does not expressly say, that the plea shall conclude to the country, but neither did the statute 5 Geo. 2, c. 30, upon which *Miles v. Williams*, (1 P. Wms. 249), was

* A bankrupt was indicted for a conspiracy. The assignment was stated in the indictment:—Held, that the subscribing witness must be called to prove the assignment. (Lord Tenterden, C. J.—*Rex v. Pope*, H. T. 1832. N. P., 5 C. & P. 208).

† By the 5 Geo. 2, c. 30, s. 7, and 6 Geo. 4, c. 16, s. 126, it is enacted, "That any such bankrupt may plead, in general, that the cause of action accrued before he became bankrupt, and may give this act and the special matter in evidence; and such bankrupt's certificate, and the allowance thereof, shall be sufficient evidence of the trading, bankruptcy, commission, and other proceedings precedent to the obtaining such certificate, and (15 Geo. 2 only) a verdict shall thereupon be given for the defendant, unless the plaintiff can prove the certificate obtained by fraud, or can make appear any concealment of the bankrupt to the value of 10*l.*"

decided. The practice has, however, uniformly been to conclude a plea of bankruptcy to the country. If, therefore, this be a general plea, it is bad by reason of its concluding with a verification. We are also of opinion, that the plea is bad in substance, inasmuch as it has not pursued the words of the statute. For these reasons, we think there should be judgment for the plaintiff.

TODD v. MAXFIELD, M. T. 1826. K. B. 6 B. & C. 105; S. C. 9 D. & R. 171.

Where the certificate is omitted to be pleaded to the original suit, it cannot be pleaded afterwards to an action upon the judgment.

THE defendant obtained his certificate pending the suit and before trial, and he omitted to plead it *puis darr. cont.*, and judgment was obtained against him.

The Court held, that he could not avail himself of it in an action on that judgment.

OSWALD v. WILLIAMS, T. T. 1836. Ex. 1 M. & W. 550; S. C. 5 D. P. C. 159; S. C. 1 T. & G. 935.

It has since been held, that certificate, though not pleaded, and a cognovit given, is a discharge.

A FIAT in bankruptcy issued against the defendant in January, 1835, and in November of the same year proceedings in this action were commenced. He obtained his certificate on the 6th May, 1836. He had pleaded to the action, and had afterwards given a cognovit, payable in three months, which expired after the time when a judgment might have been obtained. The defendant having made default, judgment had been signed on that cognovit, and he had been taken in execution.

The Court held, that the cognovit did not confer any new right upon him, but only operated as a confession of the right of the action, and made the rule absolute for the discharge of the defendant, upon his producing an affidavit of the due inrolment of the certificate.

SHARP v. D'ALMAINE, T. T. 1840. Q. B. 8 D. P. C. 664.

In a subsequent case it was decided, to enable a bankrupt to avail himself of his certificate, he must not allow unreasonable delay.

AN action on an annuity-deed was commenced against a defendant in May 1839, a fiat issued against him in June in that year, and he obtained his certificate in December. In July he pleaded *non est factum*. In January following, he applied to a Judge to be allowed to plead his certificate *puis darrein continuance*, and was refused. In March he applied again, at Chambers, with the same success; and the plaintiff obtained a verdict at the following assizes, and afterwards signed judgment. The defendant applied to the Court to stay proceedings, pursuant to 6 Geo. 4, c. 16, s. 121—

And the Court refused the application, as the defendant had been guilty of unreasonable delay in availing himself of his certificate.

BAKER v. MORREY, M. T. 1827. C. P. 1 M. & P. 138.

An uncertificated bankrupt first pleaded the general issue, and, before trial, pleaded his certificate *puis darrien continu-*

THE defendant, being an uncertificated bankrupt, a writ of *capias ad respondendum*, at the suit of the plaintiff, was issued against him in this cause, returnable in fifteen days of Easter in last Easter Term; and he was arrested thereon, and gave bail. The defendant pleaded the general issue; on which issue was joined in that term, and notice of trial was given for the first sittings in Trinity Term, which was afterwards continued to the second sittings, when the

record was duly passed and the cause set down. The defendant having subsequently obtained his certificate, his attorney delivered to the plaintiff's attorneys a plea of bankruptcy and certificate puis darrein continuance. The notice of trial was accordingly countermanded and the record withdrawn, and the defendant's attorney ruled the plaintiff's attorneys to reply. The latter obtained a Judge's order for time to reply until the first day of this term, and then determined to proceed no further in the action. Judgment of non pros. was afterwards signed against him for want of a replication, and the defendant's costs taxed at 19*l.* 15*s.*, and execution issued for the amount.

Per Cur.—The defendant, in this case, was certainly not entitled to any costs incurred prior to the delivery of his plea puis darrein continuance; he could not sign judgment of non pros.

ance; the plaintiff withdrew the record; defendant ruled the plaintiff to reply:—Held, that the defendant could not sign judgment of non pros.

2. *Of replying to Plea of Bankruptcy.*

WOLLEN *v.* SMITH, H. T. 1839. Q. B. 1 *P. & D.* 374.

THE defendant was arrested on the 12th November, 1836, and the plaintiff declared in February, 1837, in which month the defendant pleaded. On the 18th March the defendant obtained his certificate, a fiat in bankruptcy having issued against him in the previous July. The defendant pleaded his certificate puis darrein continuance, and ruled the plaintiff to reply.

The Court said—Where the defendant pleads a plea puis darrein continuance, he cannot compel the plaintiff to proceed with his suit; but the latter is at liberty to discontinue without costs. There is no distinction in regard to the plea of bankruptcy and certificate, the 6 Geo. 4, c. 16, s. 59, not preventing the plaintiff from discontinuing without costs, where the defendant pleads puis darrein continuance.

Upon a plea of bankruptcy puis dar. cont. the plaintiff need not reply, but may discontinue without costs.

HORN *v.* ION, E. T. 1832. K. B. 1 *N. & M.* 627; S. C. 4 *B. & Ad.* 78.

PLEAS, bankruptcy, generally; bankruptcy and certificate, specially. The replication to the last plea averred, that the certificate had been obtained by the defendant unfairly and by fraud; which the defendant, in his rejoinder, denied.

The Court held, that, although the 6 Geo. 4, does not contain the clause which was in 5 Geo. 3, c. 20, s. 10, yet, it being a good answer at common law that the certificate was obtained by fraud, it was a good answer to the plea of bankruptcy that the supposed certificate was obtained by fraud.

That the certificate was obtained by fraud, is an answer to the plea of bankruptcy.

3. *Evidence on Plea of Bankruptcy and Certificate.*

TAYLOR *v.* WELSFORD, H. T. 1830. N. P. 1 *M. & M.* 503.

To support a plea of bankruptcy, the counsel produced the certificate, duly allowed; and said that this was sufficient proof, before the stat. 6 Geo. 4, c. 16, by stat. 5 Geo. 2, c. 30, s. 7, and that the same law was re-enacted by the former statute (s. 126).

Tindal, C. J., admitted the evidence as sufficient.

The production of a certificate duly allowed,

JACOBS *v.* PHILLIPS, T. T. 1834. Ex. 1 C., *M. & R.* 195; S. C. 2 D. P. C. 716; S. C. 4 *Tyr.* 652—S. P. OSWALD *v.* WILLIAMS, T. T. 1836. Ex. 1 *M. & W.* 550; S. C. 1 T. & G. 935.

and inrolled according to 6 Geo. 4, c. 16, is sufficient evidence.

ON motion to discharge the defendant out of custody on an attachment for non-payment of costs, on the ground that he had obtained his certificate under a commission of bankruptcy, it was objected, that it did not appear that the certificate was inrolled of record according to the provisions of the Bankrupt Act, 6 Geo. 4, c. 16, s. 128. It was urged, in answer, that the bankrupt was entitled to be discharged on the certificate being allowed, not on its being inrolled.

Sed per Cur.—How can we say that it was allowed, without the proof of that fact required by the statute? The bankrupt is to be discharged on the production of the certificate. The certificate could not be read by us unless it were inrolled.

(b) PRIVILEGES OF*.

Ex parte CULLIFORD, E. T. 1828. K. B. 8 B. & C. 220.

After bankruptcy and certificate, the court will not summarily interfere against an attorney with respect to money received by him as an attorney, except in the case of fraud.

RULE to shew cause why the defendant, an attorney, should not pay over a sum of money, paid by Culliford to him as his attorney, being the amount of interest of a mortgage procured by Warren, in 1823, for Culliford, and which it was his duty to have transmitted to the mortgagee; but that Warren had, on his way to the place of meeting appointed for transferring the mortgage, been arrested for debt; and that he had subsequently been made a bankrupt, and duly obtained his certificate.

Lord Tenterden, C. J.—We see nothing in this case which ought to deprive the attorney of the privilege of his certificate.

(c) LIABILITY OF, ON A NEW PROMISE.

HURBERT *v.* MOREAU, M. T. 1826. N. P. 2 C. & P. 528; S. C. 12 *Moore*, 216.

A written promise to pay a debt after certificate, must be signed by the defendant†.

ACTION for work and labour as an attorney. The defendant afterwards became bankrupt, and before he had got his certificate called at the office of his attorney, to whom he was indebted, and wrote there, (the attorney not being at home), a letter, promising to pay him a sum of 100*l.* The only signature was a flourish of the pen, which, it was contended by the plaintiff, formed the letter M., the initial letter of the defendant's name.

The Court held, that, if it was an M., it was not a sufficient signature under the statute 6 Geo. 4, c. 16, s. 131.

* By the 5 Geo. 2, c. 30, s. 7, and 6 Geo. 4, c. 16, s. 126, it is enacted, "That any bankrupt who shall, after his certificate shall have been allowed, be arrested, or have any action brought against him for any debt, claim, or demand, hereby made proveable under the commission against such bankrupt, shall be discharged upon common bail."

† A subsequent promise by the bankrupt to pay a debt discharged by the certificate must, by the 6 Geo. 4, c. 16, s. 131, be in writing.

(d) OF HIS COMPETENCY AS A WITNESS.

BASSETT v. DODGIN, H. T. 1833. C. P. 9 Bing. 654; S. C. 2 M. & Scott, 777.

THIS was an action brought by the plaintiff, as holder, against the defendants, as indorsers, of two bills of exchange, one for 115*l.*, the other for 105*l.* The bills were drawn by Joseph Taylor upon, and accepted by a person named *Daniel*. They were indorsed by Taylor to the defendants, and by the latter to the plaintiff. The indorsements of the defendants were matters of accommodation, and they were given to Taylor to enable him, by having the bills discounted, to take up two acceptances, with which the defendants had in another instance accommodated him. Upon the former occasion they were accommodation acceptors, upon this they were accommodation indorsers. The bills were due in August, 1831. The defence was *usury*, and Taylor, the drawer, being called to support such defence, admitted on the *voir dire*, that he was a bankrupt, and had obtained his certificate. It was maintained for the plaintiff, that he was incompetent, through interest, inasmuch as his case was not within the 52nd section of the act; for it could not be said that he was a *surety*, or *liable* for any debt of the bankrupt, at the issuing of the commission; consequently, he could not prove under the commission, and Taylor's certificate was no bar.

The Court held, that they were "persons liable at the issuing of the commission for a debt of the bankrupt," within the 6 Geo. 4, c. 16, s. 52, and entitled, therefore, to prove the amount of the bill; and consequently, that the certificate was a bar to any action against the bankrupt, and he was therefore a competent witness on the part of the defendants.

Where defendants are "persons liable for the debt of the bankrupt, within 6 Geo. 4, c. 16, s. 52, the certificate is a bar to any action against the bankrupt, and he is therefore a competent witness for the defendants*.

AFFALO v. FOURDRINIER, M. T. 1829. C. P. 3 M. & P. 743.

IN an action on a bill of exchange against two partners, one of them pleaded in bar his bankruptcy and certificate. The defendant on the record gave the plaintiff notice to prove the consideration; and, at the trial before the Lord Chief Justice, Moses Almosino was called as a witness, on the part of the defendant Fourdrinier, to prove, that he, Fourdrinier, had received no consideration for the bill in question, but that it had been improperly drawn on Fourdrinier & Co., (of which firm Moses Almosino was a partner), by Solomon and Moses Almosino, and that it was a mere accommodation bill between the plaintiff and Moses. Moses had released his interest. On the part of the plaintiff, Moses Almosino was objected to as an interested witness.

In an action against two partners, one pleaded bankruptcy, the plaintiff entered a *nol. pros.*—Held, that, having released the surplus, he was a competent witness for his partner†.

The Court held, that this made him a competent witness.

* A letter, referring to a debt, and stating, that, "by the end of next month, I shall have my banker's account here, and I shall remit the sum due to you by draft on them," is a sufficient acknowledgment after bankruptcy to bind the bankrupt. (*Tindal, C. J.*—*Lang v. Mackenzie*, M. T. 1830, N. P., 4 C. & P. 463).

† An uncertificated bankrupt is a competent witness to prove, in an action for work and labour, that he was employed to do the work and not the plaintiff. (*Abbott, C. J.*—*Wilson v. Gallatly*, M. T. 1826, N. P., 2 C. & P. 467).

PERRYMAN *v.* STEGGALL, E. T. 1832. C. P. 1 *M. & Scott*, 540;
S. C. 8 *Bing*. 369.

But in an action against his surety, he must release the bankrupt's estate, and the bankrupt must release his surplus.

THIS was an action on a promissory note given by the defendants, as sureties for one Tucker, payable to the order of Messrs. Sylvester & Walker, and by them indorsed to the plaintiff. The defence was, that the note was given as a security for money which Fisher had borrowed of Sylvester & Walker at an usurious rate of interest. To prove that transaction, the defendants called Tucker, against whom, (since the note was given), a commission of bankruptcy had been issued and was in force, who had not obtained his certificate, and who, after his bankruptcy, had been discharged under the Insolvent Debtors' Act. It was objected, that Tucker was incompetent to give evidence, on the ground of interest, as the defendants, his sureties, would be entitled to prove under his commission, what might be recovered against them in this action. The defendants, thereupon, executed the usual general release to Tucker.

Per Cur.—A general release by a creditor to a bankrupt is not sufficient to render the bankrupt a competent witness for the creditor, where the result of his testimony would give the creditors a right to prove under the commission. The creditor ought also to give a release to the assignee of all claim on the bankrupt's estate, and the bankrupt ought to release his claim to a surplus.

Banks. See tit. *Nuisance*.

Banns. See tit. *Marriage*.

Baptism. See tit. *Misnomer*.

Barley. See tit. *Tithes*.

Bar of Dower. See tit. *Dower*.

Bar, Pleas in. See tit. *Pleas, and Particular Titles*.

Bargain and Sale*.

Baron and Feme. See tit. *Husband and Wife*.

* A bargain and sale within the Statute of Uses (or, in other words, a bargain and sale properly so called) is a contract in consideration of money or money's

Barrister*.

Ex parte SERJEANTS AT LAW, H. T. 1840. C. P. 8 D. P. C.
268; S. C. 6 Bing. N. S. 187.

THE validity of the Royal warrant of the 23rd April, 1834, whereby it was directed that the King's counsel and all other barristers at law should, according to their respective rank and seniority, have and exercise equal right and privilege of practising, pleading, and audience in the Court of Common Pleas, was brought under the consideration of the Court, by Wilde, Serjt., on behalf of himself and those Serjeants on whom no higher rank and place in the Courts of Law and Equity had by that warrant been conferred. He stated that a memorial had been presented to the Crown, praying that legal advice might be taken as to the legality of the war-

Serjeants at law have the exclusive right of pleading in the Common Pleas in term time.

worth, by the owner of land, for the total or partial alienation of his interest; which contract raises a use in favour of the purchaser, grounded on the seisin of the bargainor, and the use so raised, (provided the contract, if it concern the freehold, be attended with the ceremonies prescribed by the Statute of Inrolment, (27 Hen. 8, c. 16)), is instantly transferred into possession by the Statute of Uses. The inrolment of the *proper* bargain and sale has relation to the execution of the instrument. The Statute of Inrolment denies effect to the assurance, "except the same bargain and sale be made by writing, indented, sealed, and inrolled, &c., and the same inrolment be made within six (lunar) months after the date," &c.; the condition being complied with, the Statute of Uses imparts legal efficacy to the use from its inception. But a bargain and sale, under an act of parliament, is, in general, merely the execution of a naked authority given to A. to dispose of the estate of B., and has no other title to the appellation of a bargain and sale than that which it derives from the occurrence of the words, "bargain and sale," in the statute which confers, and in the instrument which executes the authority.

Under the stat. 10 Anne, c. 18, s. 3, examined copies of the inrolment of a bargain and sale, (i. e. such a bargain and sale as is within the Statute of Inrolment), are admissible in evidence, notwithstanding the existence of the original. The conveyance by bargain and sale is, therefore, sometimes adopted on account of the security and facility in point of evidence afforded by the inrolment, particularly where the subject of conveyance is a large estate about to be sold in lots; and it was formerly much the practice to convey to a purchaser as well by lease and release, as by a contemporaneous bargain and sale inrolled. It should be borne in mind, however, that if a bargain and sale be made to A., to uses, the legal estate will be executed in A., and the uses in effect will be trusts in equity; for that which passes by the bargain and sale is the *use*, upon or out of which uses of course cannot be limited. But it is conceived that the use may be distributed through a series of limitations, by way of bargain and sale; and, consequently, that a bargain and sale may be made to the use of a purchaser for life, with remainder to a trustee, for the life of the purchaser, with remainder to the purchaser in fee. The power of appointment, however, which forms part of the limitations hitherto commonly inserted to prevent dower under the old law, would be inadmissible.

The consideration of money, or of money's worth, is essential to raise the use; but it is by no means requisite that the consideration should move from the bargainee to the bargainor.

With respect to bargains and sales in bankruptcy, they are taken away, except as to copyholds, by the act of 1 & 2 Will. 4, c. 56, ("An act to establish a Court of Bankruptcy"), which vests all the other real estate of the bankrupt in the assignees by virtue of their office. (s. 26).

* An action for defamation will not lie against a barrister for words spoken by him as counsel in a cause, pertinent to the matter in issue. (*Hodgson v. Scarlett*, 1 B. & A. 232).

But although counsel, in the discharge of their duty, are privileged, still, if he utters matter injurious to individuals, the subsequent publication of such matter is unlawful. (*Flint v. Pike*, 6 D. & R. 528; 4 B. & C. 473; Abr. post, tit *Libel*).

rant; which memorial had been referred to, and the question discussed before the Judicial Committee of the Privy Council; but that the consideration thereof had been adjourned sine die, and the Crown had declined to interfere. The Serjeants, therefore, in their assertion of their ancient rights, and in order to maintain their privileges, could only call upon the Court to vindicate its legal constitution and practice, by excluding all barristers not of the degree of the coif.

Per Cur.—At the time when the warrant from his late Majesty was openly read in Court, in the presence of all the Serjeants, if any one of our learned brethren had expressed a doubt as to its validity or legality, and had desired the opinion of the Court upon that point, we should have felt it our duty to have paused before we gave effect to the warrant, and should have given our deliberate opinion upon the objections which might have been urged in argument upon it; but no such doubt was then suggested: indeed, the larger number of the Serjeants accepted, under the warrant, the grace and favour of the Crown in making their rank permanent; and those of our brethren, who had previously obtained their rank from the Crown, and who are now the only parties to the application, allowed the matter at that time to pass sub silentio. The question before us turns upon the single point, whether the Serjeants at Law have, by the constitution of the Court, and, consequently, by law, held and enjoyed the sole and exclusive privilege by virtue of their office or degree of Serjeant, of practising, pleading, and audience in the Court of Common Pleas; for if they are so entitled, we think they cannot be deprived of it by warrant from the Crown, under sign manual; nor, indeed, by any power short of that of an act of the whole Legislature. That the antiquity of the state, degree, and office of Serjeant at Law is as high, at least, as the existence of the Court itself, is evident from all the text writers and records which bear upon the point. They are mentioned in the *Mirror of Justices*, a book of great authority, and of the earliest though uncertain antiquity; by Bracton, who wrote in the time of Henry the Third; and in records, which are to be found in the Tower, of the time of Edward the First. We, therefore, think ourselves justified in saying, that, from time immemorial, the Serjeants have enjoyed the exclusive privilege of practising, pleading, and audience in the Court of Common Pleas. Immemorial enjoyment is the most solid of all titles, and the warrant of the Crown can no more deprive the Serjeant, who holds an immemorial office, of the benefits and privileges which belong to it, than it could alter the administration of the law within the Court itself. The rights and privileges of the Serjeant, and the rights and privileges of the peer of the realm, stand upon the same foundation—immemorial usage. We hold, therefore, that the rights of the Serjeants to the sole and exclusive privilege which they claim, is still in existence, notwithstanding the King's warrant; and we feel ourselves bound, in the due course of administering justice, to allow such right to be still exercised.

PADDOCK *v.* FORESTER, T. T. 1840. C. P. 8 D. P. C. 834.

Except as regards her Ma-

THE Attorney-General said, that, in addressing the Court, he did not mean to impugn or infringe the rule laid down by the Court,

by which all members of the profession, who had not the degree of the coif, were excluded (except under particular circumstances) from practising in the Court during term. Taking it for granted that the Judges were vested with the discretionary power of hearing whom they pleased, he bowed implicitly to the rule to which he referred; but he appeared before them, on this occasion, as the law officer of the Crown, to certify officially that the rights of the Crown were affected in a certain matter connected with the Duchy of Lancaster, and to pray a trial at bar, instead of one at Nisi Prius.

Per Cur.—As at present advised, we are of opinion, that the Court is not closed against the Queen; wherefore, let the writ of Nisi Prius be forbidden, and the rule for a trial at bar be made absolute.

LUNTLY *v.* NATHANIEL, E. T. 1833. Ex. 2 D. P. C. 51; S. C. 1 C. & M. 579.

MOTION to discharge the defendant, a practising barrister, out of custody. It appeared that, at the time of the arrest of the defendant, he was returning from the Sessions at Newington, where he had been engaged as counsel in several prosecutions and defences, and was proceeding home to his house at Lambeth. But it was sworn that the defendant, at the moment of the arrest, was in a picture shop near the Obelisk.

Per Cur.—A practising barrister is privileged from arrest, eundo, redeundo, morando. It is unnecessary to consider the general question of a barrister's privileges, as we think the defendant here was clearly arrested redeundo; if he had remained an unreasonable time in the shop, it might have been different.

WETTENHALL *v.* WAKEFIELD, M. T. 1833. C. P. 10 Bing. 335; S. C. 3 M. & Scott, 805; S. C. 2 D. P. C. 759.

THIS was a rule calling on the plaintiff to shew cause why a suggestion should not be entered on the roll, under the London Court of Conscience Act, (39 & 40 Geo. 3, c. 104), for the purpose of depriving him of costs. The 12th section of the statute enacted, "That if any action or suit shall be commenced in any other Court than the said Court of Requests, for any debt not exceeding the sum of 5*l.*, and recoverable by virtue of the said recited acts and of this act, or any of them, in the said Court of Requests, then, and in every such case, the plaintiff or plaintiffs in such action or suit shall not, by reason of a verdict for him, her, or them, or otherwise, have or be entitled to any costs whatever." The motion was founded on the affidavit of the defendant, which stated that he was a barrister at law, and that he and the plaintiff, at the time of the commencement of the suit, were, and ever since have been, and still are respectively inhabiting and resident in the city of London; and that he, this deponent, for and during all that time was and still is liable to be summoned to the Court of Requests, held at the Guildhall of the said city; and that the said plaintiff, in the trial of the said cause, obtained a verdict for 4*l.* 4*s.*, and no more.

Per Cur.—As there are several causes of action excepted out of the operation of the act, the affidavit of the defendant would of itself have been insufficient to support the motion, inasmuch as it

A barrister redeundo from Court is privileged from arrest.

So, a barrister must be sued in the London Court of Requests; if not, a suggestion may be entered as to costs.

omitted to state that the present cause of action was recoverable in the Court of Requests; an allegation that is usually found in affidavits in support of such applications. But this defect in the defendant's affidavit appears to us to be removed by the affidavit of the plaintiff, which was used in answer to it; which latter states that the action was brought for services rendered by the plaintiff for the defendant. The principal ground, and, indeed, the only one of any weight, relied on by the plaintiff in opposing this application, was one which arose from the defendant describing himself, in his affidavit, as a barrister at law; and it was thereupon contended, that a barrister, when defendant, is exempted from the operation of the act; and, if exempted, that he cannot, by his own election not to avail himself of such exemption, bring the plaintiff within the operation of the act; and, consequently, that the defendant is unable to enter the suggestion. Upon looking, however, at the act, we are satisfied there is no ground for contending that a barrister is entitled to any such exemption.

NEWTON and Wife *v.* HARLAND, E. T. 1838. C. P. 6 D. P. C. 630; S. C. 4 Bing. N. S. 406; S. C. 6 Scott, 186.

But a barrister, called after action commenced, has no privilege as to the venue, nor has he any privilege if his wife be a party to the action.

ON an application to bring back the venue, it appeared that the action was commenced in Easter Term, 1837; and the ground on which this motion was made was, that of the privilege of one of the plaintiffs, who was a barrister, and was now pursuing the practice of the law. It was submitted, that the privilege of a barrister was equal to that of an attorney; but, in the present case, there was a difficulty in the plaintiff not having been called to the bar until after the commencement of the action.

Per Cur.—The plaintiff has no right, by his voluntary act in being called to the bar, to inflict an inconvenience on the defendant. If a person is joined with his wife as defendant, he cannot enjoy the privilege, and the same rule must apply here.

REX *v.* ALLEN, H. T. 1834. K. B. 3 N. & M. 184; S. C. 5 B. & Ad. 984.

The principal of an inn of Chancery cannot be compelled by mandamus to attend before the bench of such inn so as to decide upon the validity of his appointment.

THIS was a rule to shew cause why a mandamus should not issue, directing defendant to attend before the Masters of the Bench of the Inner Temple, or such as they might appoint, and take with him the rules and regulations of the Honourable Society of Clifford's Inn, to enable the said masters of that bench to decide upon the validity of his election to the office of principal of that society.

Per Cur.—No examples of the exercise of the jurisdiction claimed have been shewn; and without some authority we cannot call upon the defendant to explain his conduct. We do not say that the benchers have done wrong. Without casting the slightest censure on the society, we think we must discharge this rule.

REX *v.* BENCHERS OF LINCOLN'S INN, M. T. 1825. K. B. 4 B. & C. 855; S. C. 7 D. & R. 351.

Nor will a mandamus lie to the inn of

A. B., having applied to become a member of Lincoln's Inn, with the view of being called to the bar, received an official letter, informing him that his application to the society was rejected by the benchers.

On motion for a mandamus—

Per Cur.—We cannot compel the Benchers of the Society of Lincoln's Inn to admit this individual to be a member of their association. A mandamus lies only where the party applying for it has a right to have a particular thing done, and where there is an obligation upon the other party to do it. In *The King v. The Benchers of Gray's Inn*, Doug. 339, Lord Mansfield, speaking of these societies, says, "They are voluntary societies." The very term, "voluntary society," imports in it a discretion in the individuals composing it to admit or reject members as they please. It is true, that the twelve Judges are the visitors of the inns of court; but, in that character, they have jurisdiction only over *actually* admitted members. But here the Court is called upon to control the society in the admission of their members. Now, as far as the admission of members is concerned, these are voluntary societies not submitting to any government. They *may*, in their discretion, *admit* or *not*, as they please, and this Court has no power to compel them to admit any individual.

Court to compel the admission of a student *.

PORTER *v.* COOPER, T. T. 1834. EX. 1 C. M. & R. 387; S. C. 4 Tyrw. 456; S. C. 6 C. & P. 354.

THE defendant having been indicted for a nuisance, and not being prepared to plead within the time prescribed by the practice of the Court of Quarter Sessions, the prosecutor said he should press for judgment for want of a plea, unless the defendant would consent to pay the costs of the day; and the matter being brought before the Court, the Court said, that the defendant must either plead and take his trial, or he might be allowed to traverse on payment of the costs of the day. The parties then conferred together, and an agreement was come to, and the following memorandum was signed by the counsel on both sides:—"Traversed to the next sessions by consent, the defendant paying the costs of the day, including counsel's fees, the prosecutor giving a copy of the replication one month before the sessions." The prosecutor afterwards got his bill of costs taxed, and the defendant was served with a copy of the allocatur, and was applied to for the amount; the defendant objected to two items, which the prosecutor's attorney agreed to take off. The defendant's attorney then offered to give his cheque for the amount, but not being pressed for, it was *not* given. The defendant, on a subsequent application for payment by the prosecutor's attor-

An indorsement on a brief by the barristers on both sides amounts to an agreement†.

* The only mode of relief is by appeal to the twelve Judges. (*Rex v. Gray's Inn*, 1 Dougl. 339). No mandamus lies to the Archbishop of Canterbury to issue his fiat to the proper officer, &c., for the admission of a doctor of civil law, graduated at Cambridge, as an advocate of the Court of Arches. (*Rex v. Canterbury, Archbishop of*, 8 East, 212). A bill in equity will not lie against the benchers of an inn of court, relative to a grant of chambers. (*Cunningham v. Wegg*, 2 Bro. C. C. 241). An action at law may be maintained upon the bond usually given to the society on being called to the bar, to recover arrears of "absent commons," "vacation commons," "preacher's dues," and "pensions," which have accrued while the party has remained a member of the society, although he has not lived in the inn or practised at the bar. (*Rosslyn, Earl of v. Jodrell*, 4 Camp. 303; 1 Stark. 147).

† Whether, in a civil case, if a party conduct his own cause, and examine the witnesses, he can be allowed to have the assistance of counsel to argue points of law:—*Quære*, but *semble* that he cannot. (*Moscato v. Lawson*, H. T. 1835, N. P., 7 C. & P. 32).

ney, requested the latter to apply to his attorney, who received his rents, *and he would arrange or pay.*

The Court held, that the arrangement at the sessions amounted to an agreement binding on the defendant independently of the order of the Court; and, that taking such agreement in connexion with what took place subsequently, a count in an account stated, for the amount of the costs, was maintainable.

IGGULDEN *v.* TERSON, M. T. 1833. Ex. 2 D. P. C. 277.

No affidavit is required from counsel as to what passes between them.

IN this case it was contended, that there was an offer between counsel, that each party should pay his own costs.

Per Bayley, B.—There is no affidavit. In reply it was stated, that it is irregular to have an affidavit from counsel. And assented to by *Bayley, B.*

COLLEGE *v.* HORN, E. T. 1825. C. P. 3 Bing. 119; S. C. 10 Moore, 431.

And, at the trial of a cause, what is stated by counsel binds his client, if present.

TO an action of assumpsit for goods sold and delivered, the defendant pleaded the statute of limitations, and the plaintiff gave in evidence, a letter written by the defendant to the plaintiff's attorney, stating, that he had received his letter respecting the plaintiff's demand; that it was not a just one; that he was ready to settle the account whenever the plaintiff thought proper to meet him on the business; that he was not in his debt 90*l.*, nor any thing like that sum, and that he should be happy to settle the business by the plaintiff's meeting him in London.

The Judge told the jury, that, after this letter, the statute of limitations was out of the question, and a verdict was thereupon found for the plaintiff, to which defendant's counsel made no objection. It was objected, that the Judge ought to have left it to the jury to determine whether or not this letter was an acknowledgment of any existing demand, and particularly whether it applied to the demand on which the action was brought, instead of taking upon himself to decide, that after the letter the statute was out of the question. The jury found a verdict for the plaintiff. On a rule nisi for a new trial, upon reading the Judge's notes, it did not appear, nor could it be distinctly ascertained in what part of the court the plaintiff stood at the former trial when the alleged submission was made by his counsel, nor whether he was within hearing of what was said.

Per Cur.—Where a letter is so clear as this, a Judge is justified in telling the jury it is an admission of a debt. Upon the other question we see no difficulty at all; parties are every day bound by the acts and declarations of their counsel. If the plaintiff was in court, heard what his counsel said, and made no objection, we think he was bound.

DOE *d.* CRAKE *v.* BROWN, 1832. N. P. 5 C. & P. 315.

A counsel, who is only retained, but no brief, cannot withdraw the record.

IN this case the counsel had no brief, but had a retainer. The plaintiff or his attorney not being present, the counsel wished to withdraw the record.

Sed per Gurney, B.—A retainer without a brief does not authorize the counsel to withdraw the record.

POUCHER v. NORMAN, H. T. 1825. K. B. 3 B. & C. 744; S. C. 5 D. & R. 648.

THE plaintiff was a certificated conveyancer, and proved that he had done business as such for the defendant, for which he had not received any remuneration. It also appeared, that the defendant had a set-off against the promissory note declared on, which would reduce the demand of the plaintiff (exclusive of his bill for conveyancing) to a small amount, much below forty shillings. On the part of the defendant, it was objected, that the plaintiff could not claim any remuneration for his labour as a conveyancer. The learned Judge allowed the objection, and the jury found a verdict for the defendant.

A certificated conveyancer may sue for his fees.

By the Court.—It is a general rule of law, that every man is entitled to a recompense for his labour bestowed for the benefit of another at his request; and that an action will lie to recover compensation for it in damages. To that rule there are two known exceptions, respecting physicians and barristers at law, who, in law, are supposed to act merely for an honorary reward, and thus are not entitled to maintain an action for a compensation for their services; but surgeons and attorneys are within the general rule, and not within the exception. Now, a certificated conveyancer is a person recognised by the law; and there is no reason why he should not have a reward for his labour, performed in his vocation, just as well as an attorney is permitted to maintain an action for fees for work done in making conveyances. We are all of opinion, that there must be a new trial.

Bastardy.

(See also tit. *Poor*).

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IV. RELATIVE TO THE SETTLEMENT OF. See post, tit. *Settlement.*

I. WHO ARE, OR ARE NOT, ESTEEMED SUCH.

MORRIS *v.* DAVIES, Sum. Ass. 1827. N. P. 3 C. & P. 215.

On an issue directed from the Court of Chancery—

If there be an opportunity of sexual intercourse between husband and wife, the law will presume such intercourse took place, so as to preclude the idea of bastardy, unless that presumption be rebutted*.

Vaughan, B., told the jury, every child born in wedlock, the husband and wife being in England, and not separated by any sentence of divorce, is presumed to be legitimate; but this presumption may be repelled by proof of such facts as satisfy the jury that no sexual intercourse took place between the husband and wife at a time when the husband could, by possibility, be the father of the child; and the jury, before they can find against the legitimacy, must be convinced that no such sexual intercourse took place by irresistible evidence, and not by a mere balance of probabilities. If such intercourse did take place, the adultery of the wife is immaterial; and if there was an opportunity of sexual intercourse between the husband and wife, the law presumes that such intercourse did take place, unless the contrary be satisfactorily proved.

MORRIS *v.* DAVIES, Sum. Ass. 1828. N. P. 3 C. & P. 427.

And that beyond all doubt†.

Per Gaselee, J.—Where the husband and wife are in such a situation, that sexual intercourse might have taken place, or that the husband, at such a time, could have been the father, the law presumes that it did, unless the facts prove, beyond all doubt, that no such intercourse did in fact take place.

* A bastard is a person begotten and born out of lawful matrimony. A child of a woman who has never been married is a bastard. A child of a woman whose marriage is unlawful and void is a bastard; as, for instance, where the person to whom she was married had at the same time another wife living, in such case the children of the second marriage are bastards, whether born during the lifetime or after the death of the first wife. A child of a widow born at such a time after her husband's death that the husband could not have been the father of it, is a bastard; but if born within the time of gestation, namely, forty weeks after the husband's death, it is otherwise.

† As if the husband be found to have gone beyond seas above two years before the birth of a child born by his wife, she remaining at home, the conclusion is irresistible, that such child is a bastard. (*Rex v. Maidstone*, 12 East, 550). Non-access of the husband need not be proved during the whole period of the wife's pregnancy; it is sufficient if the circumstances of the case shew a natural impossibility that the husband could be the father, as where he had access only a fortnight before the birth. (*Rex v. Luffe*, 8 East, 193).

COPE *v.* COPE, 1833. N. P. 5 C. & P. 604; S. C. 1 M. & Rob. 269.

Per Alderson, J.—If a husband have access, and others at the same time are carrying on a criminal intimacy with his wife, a child born under such circumstances is legitimate in the eye of the law. But if the husband and wife are living separate, and the wife is notoriously living in open adultery, although the husband have an opportunity of access, it would be monstrous to suppose, that, under these circumstances, he would avail himself of such opportunity.

Others having access at the same time does not establish bastardy.

DOE *d.* BIRTWHISTLE *v.* VARDILL, E. T. 1826. K. B. 5 B. & C. 438; S. C. 8 D. & R. 185.

THE question in this case was, whether a child who is born before the marriage of his parents can inherit real property in England, even though, by the law of the country in which he was born, and in which his parents were married, he should be declared legitimate and capable there of inheriting.

Per Cur.—It appears to us, that we should not be warranted in saying, that we can give effect to this legitimizing of the child by the subsequent marriage of the parents in Scotland. It by no means follows, that, because we allow the validity of the marriage, therefore, we are to allow all the consequences of that validity. It is not contrary to the law of England to say, that a marriage celebrated in any part of the world, according to the law of that particular place in which it is celebrated, is a good marriage in England. On the contrary, the law of England would be the law of all foreign countries, at least as to the manner and form of the celebration of the marriage, and allows every marriage to be a good marriage in England which is a good marriage by the law of the country in which it happened to be solemnized. It is part of the law of England to allow the validity of this marriage; but it by no means follows, that it is part of the law of England to allow the consequence which follows that marriage in this kingdom, and to allow the effect by which a child, born before the marriage of its parents, is considered to be born after their marriage. It appears to us by no means to follow, because you allow the validity of the marriage, you are to allow all the consequences which the law of the country in which the land is situated does *not* allow.

But a child born before marriage is illegitimate, and cannot inherit real property*, though he would by the law of the country where born.

REX *v.* SOURTON, E. T. 1836. K. B. 5 A. & E. 180; S. C. 6 N. & M. 575.

IN a settlement case, the respondents proved the birth of the pauper twenty-five years before in the appellants' parish, and the appellants called the father of the pauper to prove his marriage with his mother before the pauper was born, and to prove a subsequent settlement gained by him in a third parish; and, on cross-examina-

Neither the mother nor father are eligible witnesses to prove non-access †.

* On a writ of error in the House of Lords, it seems that a son born of Scotch parents, in Scotland, before wedlock, is rendered competent to inherit lands in England by their subsequent intermarriage. (*Doe d. Birtwhistle v. Vardill*, 2 Cl. & Fin. 571).

† If the mother be unmarried, she may prove her child to be a bastard by proving that she was unmarried at the time of its birth, and during the whole

tions, he was asked questions with the avowed object of shewing an impossibility of access to his wife for five years previous to the birth of the pauper; and the Sessions admitted that evidence, and found, that, except for such evidence, they had not sufficient ground to find non-access.

The Court held, that the Sessions were not justified in admitting such evidence as proof of the fact of non-access. Neither the husband nor wife are competent witnesses to give direct proof of that fact, nor can they be allowed to prove facts the necessary consequence of which is to shew that there could be no access.

II. LIABILITY OF PARENTS AT COMMON LAW.

CAMERON *v.* BAKER, E. T. 1824. N. P. 1 C. & P. 268.

It has been said, that the father of a bastard, who consents to make an allowance, cannot withdraw it without giving notice of his intention so to do.

THE defendant allowed 5*l.* per quarter for the support of his illegitimate child. He having discontinued it, the present action was brought.

Per Best, C. J.—Although the father of an illegitimate child is not bound to provide for it, unless in pursuance of an order of Justices, yet if he consents to do so, he must continue to provide for the child until he has given a distinct and unequivocal notice that he intends to be responsible no longer.

NICHOLS *v.* ALLEN, M. T. 1827. N. P. 3 C. & P. 36.

Hence, a putative father, knowing his child (sixteen years old) is boarded and lodged, which he neither assents to, nor disassents from, is liable.

AN illegitimate child had been boarded and lodged by the plaintiff. It appeared that the father, the defendant, knew of the fact; but he had in no way interfered, or promised payment.

Per Lord Tenterden, C. J.—If a person know that his illegitimate daughter, of the age of sixteen, is boarded and clothed by the plaintiff, and neither expresses dissent, nor takes his daughter away, he is liable to pay the plaintiff for such board and lodging, without any express promise to do so; and it lies on the defendant to shew, that his daughter was boarded and lodged by the plaintiff against his consent, or that he has refused to be at the expense of maintaining her.

FURRILLIO *v.* CROWTHER, M. T. 1825. K. B. 7 D. & R. 612.

Semble, *contra*.

A FATHER, after having made various payments in support of a bastard child, declined further assistance, unless the mother obtained an order of affiliation. In an action for the arrears of its maintenance—

time of gestation; if a widow, she may prove it by proving the time of its birth, and the time of the death of her husband. If the mother be reputed to be a married woman, the marriage may be disproved, or facts shewing its invalidity may be proved, either by her, (*Rex v. Bramley*, 6 T. R. 330), or by the man to whom she was reputed to be married. (*Rex v. St. Peter's in Worcestershire*, Burr. S. C. 25). Or if she be married, she may prove her connection with the putative father; (*Rex v. Luffe*, 8 East, 193); but she shall not be permitted to prove the non-access of her husband, (*Id.*; *Rex v. Rook*, 1 Wils. 340), even after the husband's death. (*Rex v. Kea*, 11 East, 132).

The Court held, that the father of an illegitimate child is under no legal obligation to maintain it, unless the steps required by 18 Eliz. c. 3, are taken; therefore, that he was not bound to continue payments to the mother which he had before voluntarily made, and that no action could be sustained by her for the arrears.

III. LIABILITY OF PARENTS BY STATUTE*.

(a) WITH RESPECT TO THE MOTHER'S LIABILITY†.

(b) WITH RESPECT TO THE FATHER'S LIABILITY‡.

1. *Of the Notice to Charge him.*

1st.—*Within what Time to be given*§.

REX v. HEATH, T. T. 1836. K. B. 6 N. & M. 345.

THE overseers did not apply for an order of maintenance for a bastard child at the next sessions after the child became chargeable, but waited until the General Quarter Sessions. It was objected, that the Quarter Sessions had no jurisdiction; but that Court overruled the objection. On a case for the opinion of the Court—

Per Cur.—The objection in this case is, that the Court of Quarter Sessions had no jurisdiction to receive the application of the overseers. Whether they had or not depends on the 72nd section of the act 4 & 5 Will. 4, c. 76, which declares that, where an

Under the 4 & 5 Will. 4, c. 76, s. 72, the order of bastardy must be made the first Session after the child becomes chargeable;

* With respect to bastards born before the 14th August, 1834, two Justices of the Peace might make an order of filiation, and thereby charge the putative father, or mother, or both, with the payment of a sum weekly for the support of the child; (18 Eliz. c. 3, s. 2); and if the order were not obeyed, a Justice of the Peace might commit the party to the common gaol or house of correction, there to be imprisoned and kept to hard labour for three months, unless the sum due were sooner paid, (49 Geo. 3, c. 68, s. 3), or the party might be indicted as for a misdemeanor at common law. But these statutes, as far as respects bastards born after the 14th August, 1834, are expressly repealed. (4 & 5 Will. 4, c. 76, s. 69).

† With respect to bastards born since the 14th August, 1834, it is enacted, by stat. 4 & 5 Will. 4, c. 76, s. 71, "That the 'mother,' so long as she shall be unmarried, or a widow, shall be bound to maintain such child as a part of her family until such child shall attain the age of sixteen, and all relief granted to such child while under the age of sixteen shall be considered as granted to such mother: Provided always, that such liability of such mother as aforesaid shall cease on the marriage of such child, if a female."

‡ By 4 & 5 Will. 4, c. 76, s. 72, it is enacted, "That, where any child shall hereafter be born a bastard, and shall, by reason of the inability of the mother of such child to provide for its maintenance, become chargeable to any parish, the overseers or guardians of such parish, or the guardians of any union in which such parish may be situate, may, if they think proper, after diligent inquiry as to the father of such child, apply to the next General Quarter Sessions of the Peace, within the jurisdiction of which such parish or union shall be situate, after such child shall have become chargeable, for an order upon the person whom they shall charge with being the putative father of such child, to reimburse such parish or union for its maintenance and support."

§ By section 73, "No such application shall be heard at such Sessions, unless fourteen days' notice shall have been given, under the hands of such overseers or guardians, to the person intended to be charged with being the father of such child, of such intended application; and, in case there shall not, previously to such Sessions, have been time sufficient to give such notice, the hearing of such application shall be deferred to the next ensuing Quarter Sessions."

illegitimate child becomes chargeable to the parish, the overseers or guardians may, if they think proper, after diligent inquiry as to the father of such child, apply “not to the Quarter Sessions of the Peace generally,” but to the *next* General Quarter Sessions of the Peace. It is reasonable and just that some limit as to time should be fixed; otherwise, the overseers might defer proceeding until the party had lost all means of proving that he was not the father of the child; and, we think, the period is to begin when the child first becomes chargeable. Here, then, the Sessions had no jurisdiction, for the *next* Quarter Sessions had passed by, and the application was made at a subsequent Sessions.

REX *v.* JUSTICES OF OXFORDSHIRE, E. T. 1836. K. B. 6 *N. & M.* 351; S. C. 5 *D. P. C.* 116.

In the absence of special circumstances; and it is for the Sessions to decide on these circumstances.

ON the question whether an application for an order of bastardy must be made at the *next* Sessions—

Per Coleridge, J.—The best rule for this Court to lay down is, that the application must be made to the next Sessions, leaving a discretion to the Justices to determine, in each case, whether, under the circumstances, it could have been made sooner with effect; which determination will still remain subject to the revision of this Court.

REX *v.* JUSTICES OF CARNARVON, T. T. 1835. K. B. 5 *N. & M.* 364.

Where chargeability arises a month before the Epiphany Sessions, application in Easter Sessions is too late.

A BASTARD child, born on the 13th November, 1834, became chargeable to the parish of Llanfihangel-y-Pennant three weeks after birth. An order under 4 & 5 Will. 4, c. 76, s. 72, on one Williams, as the putative father, was applied for at the Carnarvonshire Easter Sessions, 1835, by the overseers of that parish. The justices considered that the application ought to have been made at the Epiphany Sessions, and was now too late; and refused to make the order.

But the case was decided on another ground.

REGINA *v.* LEWIS, M. T. 1838. Q. B. 1 *P. & D.* 112; S. C. 8 *Ad. & E.* 881.

But where the defendant keeps out of the way to avoid service of notice, the order of bastardy may be made at a subsequent Sessions.

THE right to apply for an order of affiliation arose on the 8th March, and the application having been made at the following Easter Sessions, the hearing was deferred until the Midsummer Sessions, on the ground of the defendant having kept out of the way to avoid service of the notice of affiliation. It was objected that it does not appear that the order was made at the next Sessions after it became chargeable.

Coleridge, J.—There is nothing to shew that it was not made at the next practicable Sessions. Was this objection taken there? Many circumstances might, there, have explained the delay; and the Sessions are to determine whether the application is in time or not.

2nd.—*By whom signed*.*

REGINA v. JUSTICES OF CAMBRIDGESHIRE, M. T. 1838. Q. B. 7 *Ad. & E.* 480; S. C. 1 *P. & D.* 249—S. P. REGINA v. JUSTICES OF SALOP, M. T. 1838. Q. B. 7 *Ad. & E.* 404.

APPLICATIONS had been made to the respective Sessions of the counties of Cambridge, Salop, and Gloucester, for orders of maintenance, under the 4 & 5 Will. 4, c. 72, s. 72, upon the putative fathers of bastards; but the applications had been refused, because the notice required to be given, by s. 73, had been signed by the two overseers, but not by either of the churchwardens, who were shewn to have existed in each of the places on whose behalf the applications were made. In the Gloucestershire case, the notice was signed by one of the guardians elected for the parish of Wheatenhurst union, in that county, and the notice itself was served on the wife of the alleged putative father, which service was objected to as insufficient. Rules nisi had been obtained for a mandamus in each case.

The Court held, that a majority of the overseers and churchwardens must sign the notice of an application to the Sessions for an order of bastardy, under the 4 & 5 Will. 4, c. 76, s. 73. The mere concurrence of the majority will not suffice.

The notice of application to the Sessions for an order of bastardy must be signed by the churchwardens, as well as the overseers.

REGINA v. JAMES, T. T. 1839. Q. B. 1 *P. & D.* 422; S. C. 10 *A. & E.* 423.

AN application was made, by the overseers of the parish of Conwil, for an order of bastardy against Theophilus James. The Justices at Sessions made the order, subject to the opinion of this Court, as to whether the notice given to the "person intended to be charged" was properly signed. The parish of Conwil was comprised within a union, under the stat. 4 & 5 Will. 4, c. 76, and was entitled to elect one guardian. The notice to the putative father was signed by the churchwarden and overseers.

But the churchwardens and overseers may sign *without* the guardian, though the parents belong to a union.

The Court held the notice sufficient, as the notice of application may be signed by the churchwardens and overseers, although the parish forms part of a union, and sends a guardian to the board.

3rd.—*Effect of Appearance when defective.*

REX v. JUSTICES OF CARNARVON, T. T. 1835. K. B. 5 *N. & M.* 364.

IN this case the notice of the intended application, under the 4 & 5 Will. 4, was insufficient. But it was contended, that the party must, by his appearing in pursuance of the notice, be considered as having waived any right to object that the notice was insufficient; that the paper which was put in was a mere copy of the notice; and that it lay upon the party defendant to procure the real notice, and shew that it was insufficient.

Lord Denman, C. J.—It is quite clear that the notice was insufficient. The objection was taken, and was never waived.

The appearance of the putative father at the Sessions will not dispense with proof of due notice of the application being given him.

* See 4 & 5 Will. 4, c. 76, s. 73, ante, p. 205, n.

2. *Of the Evidence.*

REGINA v. READ, H. T. 1839. Q. B. 1 P. & D. 413; S. C. 9 Ad. & E. 619.

The order of affiliation upon the evidence of the mother must shew it was corroborated in some material particular*.

THIS order of affiliation was objected to, because it is alleged that the Court adjudicated upon a due examination of the cause and circumstances of the premises, as well upon the oath of the said Maria Hare as upon evidence in corroboration thereof, in the presence of the said William Read. By the 4 & 5 Will. 4, c. 76, s. 72, it is provided, that no order shall be made, unless the evidence of the mother shall be corroborated in some material particular by other testimony to the satisfaction of the Court.

Per Cur.—The order is bad. It is not doubtful, but defective. It should have shewn that the mother was corroborated in some material particular. If it omit anything necessary to give jurisdiction, we cannot alter it.

3. *Of the Order of Affiliation†.*

REGINA v. LEWIS, M. T. 1838. Q. B. 1 P. & D. 112; S. C. 8 Ad. & E. 881.

It is sufficient for the order of affiliation to state, that the Sessions are satisfied the de-

AN order of bastardy, after the usual recital, stated,—“And the said overseers having now made such application accordingly, and the said Richard Lewis being at the same time here present, and it *being now duly proved* to this Court, in the presence and hearing of the said Richard Lewis, that the said child was, on the 25th day of

* By 4 & 5 Will. 4, c. 76, s. 72, “The Court to which such application shall be made shall proceed to hear evidence thereon; and if it shall be satisfied, after hearing both parties, that the person so charged is really and in truth the father of such child, it shall make such order upon such person, in that respect, as to such Court shall appear to be just and reasonable under all the circumstances of the case: provided always, that the evidence of the mother be confirmed in some material particular.”

† By 4 & 5 Will. 4, c. 76, s. 74, it is enacted, that, “If such person so intended to be charged, shall not appear by himself or attorney, at the time when such application shall come on to be heard before such Court according to such notice, such Court shall nevertheless proceed to hear the same, unless such overseers or guardians shall produce an agreement under the hand of such person, to abide by such order as such Court shall make thereon, without the hearing of evidence by such Court: provided always, that such Court may, notwithstanding such agreement, require that evidence shall be given in support of such application, if it thinks fit, before such order is made.” If the Court make an order, they thereby, after reciting the application, and hearing, &c., require the putative father to pay a weekly sum, usually 1s. 6d. or 2s., to the overseers, for its future maintenance, and also any sum which may have already been expended in maintaining it during the six calendar months previous to the hearing of the application. (4 & 5 W. 4, c. 76, s. 73). And the statute provides, that “such order shall in no case exceed the actual expense incurred, or to be incurred, for the maintenance and support of such bastard child, while so chargeable, and shall continue in force only until such child shall attain the age of seven years, if he shall so long live; provided also, that no part of the monies paid by such putative father, in pursuance of such order, shall at any time be paid to the mother of such bastard child, nor in any way be applied to the maintenance and support of such mother. (Id. s. 72).

Under the 4 & 5 Will. 4, c. 76, and 2 & 3 Vict. c. 85, it is not an objection to the order, that it does not state the mother to have been settled in the parish applying, or chargeable thereto, or that the consent of the guardians to the application was obtained. (*Reg. v. Justices of Hampshire*, M. T., 1840, B. C., 9 D. P. C. 171).

October last, at the parish aforesaid, born a bastard of the body of the said Elizabeth Jones; that the said child, on the 6th day of March last, by the *inability of its said mother* to provide for its maintenance, became, and from thence hitherto hath been, and still is, *chargeable* to the said parish; and that he, the said Richard Lewis, is the father of the said child: and the evidence of the said Elizabeth Jones having been corroborated in divers material particulars by other testimony, and this Court having heard all parties, *and being satisfied that the said Richard Lewis is really and in truth the father of the said child;* then adjudged the father to pay, &c.

The Court held, that the order was good, though it did not expressly adjudge the defendant to be the father, but only stated the Court to be satisfied of that fact.

defendant is the father, and, generally, that the child is chargeable by reason of the mother's inability.

REGINA v. CODD, H. T. 1839. Q. B. 1 P. & D. 456; S. C. 9 A. & E. 682.

AN order of filiation had been made by justices, for the payment of a weekly sum on the putative father of a bastard child, against which no appeal had been made for being excessive. On application to the defendant, a magistrate, to enforce the order, it was represented to the defendant that the sum of 7s. per week was too much to be charged for the maintenance of this child, and that the parish officers might maintain it at a less expense, and the defendant refused to commit Woodward for the sum demanded, but offered to enforce the order for a less sum than that ordered to be paid. On motion for a mandamus to compel the defendant to commit Woodward—

Per Cur.—The justices are authorized to make an order on the father to pay a certain sum so long as the child is chargeable to the parish. If he chooses to provide a maintenance at a less expense he can do so, and render it no longer chargeable. In that case the order would be suspended; but, if he do not, he cannot be relieved from it. If the order were excessive in the first instance, he might have appealed; but such an inquiry as this has never been gone into where a justice has been called upon to enforce an order.

Where an order of bastardy directed an excessive payment of a weekly sum, against which no appeal was made, a justice, in enforcing the order, cannot inquire whether the whole was expended.

WILKINS v. WRIGHT, M. T. 1833. Ex. 2 C. & M. 191; S. C. 3 Tyrw. 524.

THE order of bastardy was to Stephen King, especially appointed a constable for this turn and purpose, and to the constable of New Buckenham in the said county of Norfolk, and to the keeper of the house of correction at the Castle of Norwich in the said county:—“Whereas, William Wilkins, of Great Ellingham, in the county of Norfolk, shoemaker, was this day brought before me, John Wright, Esq., one of his Majesty's justices of peace in and for the said county, for not performing an order of bastardy, made under the hands and seals of two of his Majesty's justices of the peace, in and for the said county, dated the 15th day of November, 1829, for the maintenance of a male bastard child, born in the said parish of New Buckenham, of the body of Sarah Aldis, single woman, he the said William Wilkins being adjudged the reputed father of the said bastard child. And whereas it hath appeared unto me, that the said W. Wil-

As the parish officers are the parties entitled to the custody of the order of bastardy, a mistake in the copy of the order of filiation may be corrected by serving on the putative father the order given to the overseer.

kins hath had notice of the said order; and Henry Ely, one of the overseers of the poor of the parish of New Buckenham, hath made oath before me, that the said William Wilkins hath not observed and performed the said order, but there is now due and owing on account of the said order, to the 16th day of May instant, the sum of 15s., the same having been demanded of him the said William Wilkins, and that he hath refused to pay the same: these are, therefore, to require you the said constable to take the said William Wilkins, and to convey him to the said house of correction, and you the said keeper are hereby required to receive him the said William Wilkins, into your custody in the said house of correction, and him there safely keep to hard labour for the space of three months, unless the said sum of 15s., due on account of the said order of bastardy, shall be sooner paid and discharged, or he shall otherwise be discharged in due course of law."

The Court held, that, as the parish officers are the proper parties to have the custody of an order of maintenance, and therefore, if, on the making of such an order, a good order be delivered to them, and a defective order to the reputed father, the former will be deemed the original and the latter only a "notice thereof," under 18 Eliz. c. 3, s. 2, the defect in which may be cured by a statement of the justices, at the time of making the order, or by a subsequent service of a correct copy of the good order.

4. *When the Father's Liability ceases.*

LANG v. SPICER, H. T. 1836. Ex. 1 M. & W. 129; S. C. 1 Tyrw. & G. 358.

The liability of the putative father (by the 57th section of 4 & 5 Will. 4, c. 76) to pay, under an order of filiation, ceases on the marriage of the mother with another*.

BEFORE the passing of the 4 & 5 Will. 4, c. 76, s. 1, which enacts, "That every man, who, from and after the passing of this act, shall marry a woman having a child or children at the time of such marriage, whether such child or children be legitimate or illegitimate, shall be liable to maintain such child or children as a part of his family, and shall be chargeable with all relief, or the cost price thereof, granted to or on account of such child or children, until such child or children shall respectively attain the age of sixteen, or until the death of the mother of such child or children, and such child or children shall, for the purpose of this act, be deemed a part of such husband's family accordingly." An order of affiliation had been made on the plaintiff. Soon after the passing of the 4 & 5 Will. 4, the mother married a man able to maintain the child. Thereupon the plaintiff discontinued his payments, and ultimately the defendant, a justice of the peace, committed the plaintiff to prison. In an action of trespass for such imprisonment—

Per Cur.—The statute compels a man to support the illegitimate children of his wife. The liability of the parish can only arise out of the inability of the husband to maintain them. It is difficult to see how the father can continue responsible. Supposing, that, at the time of the passing of the act, the child was chargeable to the parish, and afterwards the mother married, if the liability on the

* And also when the child attains the age of seven years. (4 & 5 Will. 4, c. 76, s. 72).

parish continued, the section would be inoperative. In truth, the present object is to compel the putative father to maintain the child instead of the husband.

5. *Of the Bond for the Maintenance of Bastards, or Deposits in lieu thereof.*

POPE v. SALE, E. T. 1831. C. P. 7 Bing. 477; S. C. 5 M. & P. 334.

THE condition of a bastardy bond, reciting, that the defendant, in order to indemnify the parish from the maintenance of the child as much as in him lay, had applied to the officers to take his security, and had entered into that bond for the payment of — per week for the support of the said child, so long as it should be provided for by the parish. In answer to an action thereon, it was pleaded that the putative father was able and willing to maintain the child himself, and had requested the plaintiff to deliver it to him for that purpose.

The Court held, that, being intended to be an indemnity, although to a limited extent, it was a legal security as a voluntary bond, and within the 54 Geo. 3, c. 170, s. 8; and that a plea, stating the defendant's offer to take the child and maintain it, amounting only to an inference that the plaintiffs, if damaged, were so of their own wrong, was no answer to the action.

A bastardy bond, to pay— per week as long as the child should be provided for at the expense of the parish, is valid; and, to an action thereon, it is no answer to say, that the father was willing to take the child, and had made a request so to do.

WANDLEY v. SMITH, M. T. 1835. Ex. 2 C. M. & R. 716; S. C. 1 Tyrw. & G. 194.

A BASTARDY bond, in the common form, was conditioned to indemnify the parish against all charges they might be put to by reason of the birth, education, and maintenance of the bastard. The defendant cravedoyer of the bond, and pleaded to both breaches, that, in 1827, the same bastard became of age, and for a long time previously had ceased to be chargeable to the parish, and had maintained himself. To these pleas the plaintiffs demurred.

Per Cur.—The action cannot be maintained; the condition was confined to secure the expenses incurred in the birth, education, and maintenance of the bastard; and the obligation ceased when he became able to maintain himself.

The obligor's liability on a bastardy bond ceases on the child's attaining its majority.

DAVIES v. ARNOTT, T. T. 1825. C. P. 3 Bing. 154; S. C. 10 Moore, 539.

THE putative father of a bastard child entered into a bond, with two sureties, to the overseers of a parish, to indemnify them against the expenses of providing for the child, and, default having been made by the father, judgment was entered up on the bond, and the two sureties were afterwards discharged under the Insolvent Debtors' Act.

The Court held, that, upon the construction of 8 & 9 Will. 3, c. 11, s. 8, coupled with 1 Geo. 4, c. 119, s. 28, the party could claim no exemption from a judgment, unless it was one which could have been put in force at the time of the discharge, and that the subsequent expenses of maintenance not having been then incurred, but *contingent and uncertain*, the parties continued liable on such judgment.

Sureties under a bastardy bond are not discharged by the Insolvent Act from the subsequent maintenance*.

* But see 1 & 2 Vict. c. 110.

CLARK v. JOHNSON, II. T. 1826. C. P. 3 Bing. 424; S. C. 11 Moore, 319.

Parish officer can only take a security as an indemnity, and not a sum of money as a deposit*.

THIS was an action of assumpsit for money had and received, and brought by the plaintiff, the mother of a bastard child, to recover the sum of 60*l.* paid on her account to the defendant, as overseer of the poor of the township of Osgodby, near Scarborough, in Yorkshire, on the birth of the child in 1818, for the purpose of indemnifying the township from any charges or expenses which might be incurred in respect of the maintenance of such child. It appeared, that the child was still alive, that the plaintiff (its mother) had never been taken before a magistrate, and that the child had not become chargeable to the township. But the learned Judge being of opinion, that there was a continuing liability or risk on the township, the child being still living, directed a nonsuit, reserving the plaintiff leave to move to set it aside, and that a new trial might be granted, in case the Court should be of opinion that she was entitled to recover. On motion for that purpose—

Per Cur.—Before the statute 18 Eliz. c. 3, no security whatever was required, and bastard children were frequently abandoned by their unnatural parents; but that act empowers two magistrates to charge the mother or the putative father of a bastard with the maintenance of it after birth; and if an order, made by them for that purpose, be not performed or complied with, then the parents of the bastard may be committed to prison, there to remain until security be given to perform the order, or abide an order to be made at the next sessions of the peace. So, by the stat. 7 Jac. 1, c. 4, s. 7, after reciting, that great charges arise in many places within the realm by reason of bastardy, it is enacted, “that every lewd woman, who shall hereafter have any bastard which may be chargeable to the parish, may be committed by the justices of the peace to the house of correction, there to be punished and set to work for the term of one year.” And by the stat. 6 Geo. 2, c. 31, which was passed to relieve parishes and other places from such charges as may arise from bastard children born within them, it was enacted, by the 1st section, “That, after the passing of the act, if any single woman shall be delivered of a bastard child, which shall be chargeable or likely to become chargeable to any parish or extra-parochial place, or shall declare herself to be with child, and that such child is likely to be born a bastard, and to be chargeable to any parish, &c., and shall, in either of such cases, in an examination to be taken in writ-

* If the putative father pay, before the birth, a fixed sum to the parish officers to discharge him from all future responsibility for the maintenance of the child, after the birth and death of the child he may recover back such part of the money as remains unexpended as had and received to his use. (*Watkins v. Hewlett*, 1 B. & B. 1; S. C. *not S. P.* 3 Moore, 211).

A note given to the officers of a parish to indemnify them against the expenses of a bastard child, is to be taken as an indemnity only as far as the parish have been put to expense, though not so expressed in the note. The maker may set up the defence, that they were not damnified. (*Wilde v. Griffin*, 5 Esp. 142—*Ellenborough*). And if a sum be paid sufficient to cover the whole of the expenses which the parish has been put to, no action can be maintained on the note. (*Ib.*)

Where the parish officers had taken a promissory note absolute for a sum certain, to which there was a plea of tender of a lesser sum as the amount of the charge actually sustained by the parish, which tender was found for the defendant:—Held, that the plaintiffs could not recover further upon the note. (*Cole v. Gower*, 6 East, 110; 2 Smith, 246).

ing, upon oath, before any one or more justice or justices of the peace of the county where such parish or place shall be, charge any person with having gotten her with child, it shall and may be lawful for such justice or justices, upon application made to him or them by the overseers of the poor of such parish, or by any one of them, or by any substantial holder of such extra-parochial place, to issue out his or their warrant or warrants for the immediate apprehending such person so charged as aforesaid, and for bringing him before such justice or justices, &c.; and the justice or justices, before whom such person shall be brought, is and are hereby authorized and required to commit the person so charged as aforesaid to the common gaol or house of correction of such county, &c., unless he shall give security to indemnify such parish or place, or shall enter into a recognizance, with sufficient security, upon condition to appear at the next general sessions of the peace to be holden for such county, &c., and to abide and perform such order or orders as shall be made in pursuance of the 18th Eliz. concerning bastards begotten and born out of lawful matrimony." Parish officers, therefore, can only require a security to indemnify the parish, the amount and nature of which is vested in the discretion of the magistrates, and even they cannot accept a sum of money by way of security.

6. *Of the Power of the Sessions and Justices connected with.*

1st.—*In general.*

By 2 & 3 Vict. c. 85, it is enacted, "That, after the passing of this act, when any child which has been born a bastard since the passing of an act, passed in the fifteenth year of the reign of his late Majesty, intituled 'An Act for the Amendment and better Administration of the Laws relating to the Poor in England and Wales,' with respect to which no application shall have been made to any court of general quarter sessions, under the provisions of the said act, shall, by reason of the inability of the mother of such child to provide for its maintenance, become chargeable to any parish, the guardians of any parish, or of the union in which any parish may be situate, or, if there shall be no such guardians, then the overseers of such parish may, if they think proper, at any time within three calendar months after such child shall have become chargeable, apply to the justices of the peace holding any special or petty sessions in and for the division or borough within which such union or parish, or any part thereof, shall be situated, for an order upon the person whom they shall charge with being the putative father of such child, to reimburse such union or parish for its maintenance and support; and the justices then and there assembled, not being less than two, shall proceed with respect to the application, and shall have all the powers and duties in regard thereunto which are given to the court of general quarter sessions by an act passed in the fifth year of the reign of his late Majesty King William the Fourth, intituled 'An Act for the Amendment and better Administration of the Laws relating to the Poor in England and Wales;' and all enactments in the said act, relating to the court of general quarter sessions, shall be taken to apply to the said justices in special or petty sessions, except that the notice to the person intended to be charged with being the father of the child need not be given more than seven

By 2 & 3 Vict.
the power of
the quarter
sessions is
transferred to
the special or
petty sessions;

days instead of fourteen days before the session at which the application shall be heard; and, after the passing of this act, it shall not be lawful to make any such application to any court of general quarter sessions, nor shall any court of general quarter sessions have any authority to make any order upon any such application."

unless the party charged enter into a recognizance to pay the costs, when the matter may be heard before the quarter sessions.

By sect. 3, it is provided, "That, if the person whom the guardians or overseers shall charge with being the putative father of such child, shall declare to the justices in such special or petty sessions, that he is desirous that the charge shall be heard and determined at the quarter sessions of the peace, and shall then and there enter into a recognizance, with two sufficient sureties, conditioned personally to appear at the quarter sessions of the peace then next or next but one ensuing, as the justices shall think fit, to answer to the said charge, and to abide the judgment of the court at such sessions, and to pay all the costs incurred by the said guardians and overseers in bringing such charge before the said court, in case the court shall adjudge him to be the putative father of such child, then the justices in special or petty sessions shall not proceed further to hear the charge, but shall take such recognizance, and transmit it to the clerk of the peace; and in such case all further proceedings in the matter of such charge shall be had before the said court of quarter sessions, as if this act had not been made."

And both have power to enforce the attendance of witnesses.

By sect. 2, it is enacted, "That any justice of the peace, upon the request of either party, may summon any witness to appear, and give evidence upon the matter of any such charge, and, by warrant under his hand and seal, may require any person to be brought before him who shall neglect or refuse to appear to give evidence at the time and place appointed in such summons, proof upon oath being first given of personal service of the summons upon the person against whom such warrant shall be granted, and that the reasonable expenses were paid or tendered to such person; and the justices before whom any such charge shall be heard may commit any person coming or brought before them, who shall refuse to give evidence, to any house of correction within their jurisdiction, there to remain without bail or mainprize for any time not exceeding fourteen days, or until such person shall sooner submit himself to be examined, and, in case of such submission, the order of any justice shall be a sufficient warrant for the discharge of such person."

REX v. WILSON, M. T. 1834. K. B. 4 N. & M. 243.

Under the 18 Eliz. c. 3, s. 2, justices have only power to make an order at the instance of the overseers of the parish where the child was born, or became chargeable to.

IN a case upon an appeal against an order of filiation, the bastard was alleged in the order to have been born in H., and which was confirmed by the sessions, but it was found that the child in fact was born in an extra-parochial place, to which the mother had been removed by the fraud of the father from H., where it would otherwise have been born. It was contended, that the statute of 6 Geo. 2, c. 31, gives jurisdiction to magistrates upon application by the overseers of the parish to which the child is likely to become chargeable, and the words of the statute do not confine the application to the overseers of the parish in which a child is born.

Per Cur.—The words of the 6 Geo. 2, are, "Whereas the laws now in being are not sufficient to provide for the securing and indemnifying parishes and other places from the great charges frequently arising from children begotten and born out of lawful matri-

mony; for remedy thereof, be it enacted, That, if any single woman be delivered of a bastard child, which shall be chargeable or likely to become chargeable, or shall declare herself to be with child, and that such child is likely to be born a bastard, &c., the justice or justices are empowered to commit, unless the person charged give security to abide and perform such order or orders as shall be made in pursuance of the 18th of Elizabeth. We are referred, therefore, by the statute in express terms to this statute of Elizabeth; and in order to see what the justices are enabled to do under the 6 Geo. 2, we must go back to the statute of Elizabeth. Under that statute the jurisdiction is confined to the making an order for the relief of the parish where the child is born, and not of the parish to which the child may be chargeable; it is only, therefore, in such cases that the justices have any jurisdiction under 6 Geo. 2.

2nd.—*To compel the Mother to swear.*

MARTIN, *Ex parte*, M. T. 1826. K. B. 6 B. & C. 80.

UPON a complaint made by the clerk of the guardians of the poor of the parish, that the prisoner, a single woman, had been delivered of a bastard child, which was likely to become chargeable to the parish, she was taken before a justice of the peace to be examined respecting the father. She refused to answer questions, or to give any information.

The Court said, a magistrate has no authority, either to call a woman before him to be examined, or to compel her to answer questions. The act, 6 Geo. 2, applies only to a complaint made *by* the woman; nor is it necessary to say, that, because one magistrate can examine, one can therefore compel her to answer.

Before 4 & 5 Will. 4*, under the 6 Geo. 2†, c. 31, a single justice could not compel the woman to be examined; it only applied to where the woman made a complaint.

3rd.—*To commit for Non-payment of Allowance.*

WILKINS *v.* WRIGHT, M. T. 1833. Ex. 2 C. & M. 191; S. C. 3 Tyr. 528.

IN an action of trespass against a justice of the peace, a warrant of commitment, under the 49 Geo. 3, c. 68, for not maintaining a bastard child, was relied on as follows:—"Norfolk, to wit. To Stephen King, especially appointed a constable for this town and purpose, and to the constable of New Buckenham, in the said county of Norfolk, and to the keeper of the house of correction, at the Castle of Norwich, in the said county. Whereas, William Wilkins, of Great Ellingham, in the county of Norfolk, shoemaker, was this day brought before me, John Wright, Esq., one of his Majesty's justices of peace in and for the said county, for not performing an order of bastardy, made under the hands and seals of two of his Majesty's justices of the peace in and for the said county, dated the 5th day of November, 1829, for the maintenance of a male bastard child, born in the said parish of New Buckenham, of the body of Sarah

The warrant of commitment must shew, that all required by the statute giving authority to commit was complied with.

* C. 76, s. 72, which transfers the power to the general quarter sessions. And by the 2 & 3 Vict. c. 85, justices in special or petty sessions make orders in bastardy. (Ante, p. 213).

† The right to examine women who have been delivered of bastards is given by 6 Geo. 2, c. 31; and women who are pregnant, but not delivered, by 49 Geo. 3, c. 68.

Aldis, single woman, he, the said William Wilkins, being adjudged the reputed father of the said bastard child: And whereas it hath appeared unto me, that the said William Wilkins hath had notice of the said order, and Henry Ely, one of the overseers of the poor of the parish of New Buckenham, hath made oath before me, that the said William Wilkins hath not observed and performed the said order, but that there is now due and owing on account of the said order, to the 10th day of May instant, the sum of 15s., the same having been demanded of him the said William Wilkins, and that he hath refused to pay the same: these are, therefore, to require you, the said constable, to take the said William Wilkins, and to convey him to the said house of correction, and you the said keeper are hereby required to receive him the said William Wilkins into your custody in the said house of correction, and him there safely keep to hard labour for the space of three months, unless the said sum of 15s. due on account of the said order of bastardy shall be sooner paid and discharged, or he shall otherwise be discharged in due course of law." It was objected, that the warrant was insufficient.

And, by the Court, the warrant cannot be sustained. The act of Parliament has pointed out very distinctly what the magistrate is to do. He is, in certain cases, to commit to the house of correction; but he can do so only, in the first place, on complaint made to him by one of the parish officers of the parish which is chargeable with the maintenance of the bastard child. That is not stated in the warrant. Second, it is necessary that the party charged shall be called on for his defence. That is not stated. Third, the magistrate is to adjudge as to what is undue and unpaid. The words of the act are, "such sum as shall appear to the justice to be due and unpaid." That is not stated. Fourth, the magistrate cannot commit, if the party charged before him shall shew some reasonable and sufficient cause for not paying. It is not stated in the warrant, that this party did not. All four objections fatal.

7. *Costs connected with*.*

(c) WITH RESPECT TO THE LIABILITY OF A HUSBAND WHO MARRIES A WOMAN HAVING BASTARD CHILDREN †.

* By 4 & 5 Will. 4, c. 76, s. 73, if the Court make the order, they cannot order the putative father to pay the overseers or guardians costs; the statute gives them no authority to do so; but if, upon the hearing of such application, the Court shall not think fit to make any order thereon, it shall order and direct that the full costs and charges incurred by the person so intended to be charged on resisting such application, shall be paid by such overseers or guardians. An order of quarter sessions made under the 4 & 5 Will. 4, c. 76, s. 73, and the 2 & 3 Vict. c. 85, ss. 1, 3, requiring the overseers to pay the costs to the putative father of a bastard, against whom an application has been made, must state an application to the justices at petty sessions, the recognizance to appear at quarter sessions, and the transmission of that recognizance to the quarter sessions. If it does not state those matters, the defect cannot be supplied by affidavit. (*Regina v. Justices of Hampshire*, M. T. 1840, B. C., 9 D. P. C. 171).

† By 4 & 5 Will. 4, c. 76, s. 57, "If the mother marry, the husband shall be liable to maintain any child or children she may have at the time of her marriage, whether legitimate or illegitimate, as a part of his family, and shall be chargeable with all relief, or the cost price thereof, granted to or on account of such child or children, until the child or children attain the age of sixteen, or the mother die.

Battery*. See tit. *Assault and Battery*.

Bawdy House†.

NORRIS v. SMITH, E. T. 1840. Q. B. 2 P. & D. 353.

THIS was an action on the case by the plaintiff against the trustees under a local paving act, which authorized them to abate any hogstye, necessary-house, or nuisance in the parish. The statute also prohibited any proceedings against them without a previous notice of action. The defendants, the trustees, served the plaintiff with notice of complaint having been made to them that he kept a brothel, and urging him to abolish it; whereupon the plaintiff gave the defendants, the trustees, notice, that, unless they gave up the informing party, proceedings would be taken against them. Accordingly, the defendants refusing to do so, the present action was brought.

The Court held, that the notice could not be deemed a proper notice of action in respect of any thing done in pursuance of the statute; and, therefore, the Court did not decide whether it was a nuisance within the words, hogstye, necessary-house, or nuisance in the parish.

Trustees under a paving act threatened to prosecute the plaintiff for keeping a brothel; he gave them notice, unless they gave up the name of their informer, he should proceed against them:—Held, not a notice of action.

Beer Act‡.

(See also ante, tit. *Alehouse*).

MAYOR OF LEICESTER v. BURGESS, T. T. 1833. K. B. 2 Nev. & M. 131.

IT appeared there was an immemorial custom in the borough, that no person, not being a burgess, or the widow of a burgess, of the said borough, should carry on the trade of alehouse-keeper within the limits of the borough; the defendant, not being a burgess, had carried on the trade of an alehouse-keeper within the limits of the borough, contrary to the said custom, and against the will of the plaintiffs.

Under 1 Will. 4, c. 64, a party, not a freeman, cannot sell beer in a borough where there is a custom to that effect §.

* See 9 Geo. 4, c. 31; 5 & 6 Will. 4, c. 19.

† Keeping a bawdy-house is a common nuisance, as it endangers the public peace, by drawing together dissolute and debauched persons, and has also a tendency to corrupt the manners of both sexes, by such an open profession of lewdness. (1 Hawk. c. 74, s. 1). And a lodger, who keeps only a single room for the purpose, is indictable as for keeping a bawdy-house. (Id. s. 3). Also, a feme covert is punishable for this offence, as much as if she were sole. (Id. s. 2). But the fact of a woman keeping a house for the purpose of her own prostitution merely, it seems, would not be sufficient, in law, to make the house a disorderly house; it must be a house for the common reception of men and women generally, for the purpose of prostitution.

‡ Licenses for sale of beer and cider regulated by the 4 & 5 Will. 4, c. 85, which extends the provisions of the 1 Will. 4, c. 64. And the 1 & 2 Vict. c. 17, s. 73, regulates canteens.

§ The carrying on by A. of the business of retailing beer in a public-house in the name and by the agency of B., the person licensed by the magistrates, is not a fraud on the licensing system. A sale to A., therefore, for the purposes of such trade, is valid. (*Brooker v. Ward*, H. T. 1834, K. B., 3 N. & M. 96: Abr. ante, Vol. I, p. 147).

Per Cur.—The object of the act was to give the public at large a power of selling beer. Under the former acts no power was given to the magistrates to grant licenses to sell beer in places where a local custom as to the granting of licenses existed. Therefore, we think that this act, which merely extends the class of persons qualified to demand a license, does not empower the granting of licenses to sell within a borough, where a local custom as to the retailing of beer exists.

NEWMAN *v.* HARDWICKE, T. T. 1838. Q. B. 3 N. & P. 368.

A conviction for selling beer at times prohibited by justices at sessions must shew that the sessions made the order, and the time at which the house was kept open.

IN an action of trespass against a justice of the peace. The conviction relied on set forth, that the plaintiff was convicted by the defendants acting in petty sessions, for that the said plaintiff being a seller of beer, ale, and porter, cider, and perry, by retail, and licensed to sell the same by retail, to be drunk on the premises, under the provisions of the statutes in that case made and provided, did, on the 7th October, 1837, *at a time declared to be unlawful by an order of the justices of the peace* for the said county, acting in and for the division of A., permit beer to be drunk and consumed in the house and premises mentioned in such license, and situate in &c., against the tenor of such license granted to the said plaintiff under the provisions of the said statutes, and contrary to the form of the said statutes. On its being contended that the conviction was bad—

Per Cur.—By the act for permitting the sale of beer by retail, the justices are required yearly, in petty sessions, to fix the hours at which beer houses shall be opened and closed. This conviction contains no statement, that any such order in petty sessions was made, nor does it state at what hour the house of the plaintiff was kept open. We are, therefore, of opinion, that, as time is so much matter of substance in this offence, the conviction is bad for want of such statement.

Behabour, Surety for good. See tit. *Articles of the Peace*.

Bench Warrant. See tit. *Warrant*.

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Bill of Costs. See tit. *Attorney.*

Bill Broker.

(See also tits. *Bankrupt—Bills and Notes*).

HAYNES *v.* FOSTER, M. T. 1833. Ex. 2 C. & M. 237.

W. AND P. carried on the business of bill-brokers. The bills in question were placed in their hands by the plaintiff, in order that they might, in their character of bill-brokers, procure them to be discounted. Messrs. W. and P. had had extensive transactions in business with the defendants. They owed the defendants a balance of some amount; and, in the early part of the week in which the bills in question were delivered to the defendants, W. and P. had applied to them for assistance, and defendants had lent them a considerable sum of money upon an undertaking, that bills should be deposited in their hands to secure them for their advances. Some bills were on that occasion produced by W. and P., but the defendants excepted to them; and it was arranged, that, in the course of the week, further bills to the satisfaction of the defendants should be delivered. Within a day or two afterwards, W. and P. stopped payment. In an action for money had and received, the plaintiff's bill having been deposited with the defendants—

A bill-broker has no right to pledge bills placed with him for the purpose of cashing.

Per Cur.—A bill-broker, who receives a bill merely for the purpose of procuring it to be discounted for his customer, has no right to mix it with bills of his other customers, and to pledge it as a security for an advance of money; for the consequence of this would, in many cases, be, that the bill of one customer might be detained for a loss arising from the dishonoured bills of other customers. Still less has the bill-broker, as we think, a right to deposit bills, which are received merely for the purpose of discount, as a security or part security for money previously due from him. We are of opinion, therefore, in this case, that W. and P. acted inconsistently with their duty to the plaintiff by depositing the bills in question, with large amount of other bills belonging to other persons, for an advance of money, and as a security in part for previous advances.

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I. RELATIVE TO THE FORM AND CONSTRUCTION OF A BILL.

(a) AS TO THE MODE OF EXPRESSION*.

(b) AS TO ITS BEING WRITTEN IN INK.

GEARY *v.* PHYSIC, H. T. 1826. K. B. 5 B. & C. 234; S. C. 7 D. & R. 653.

INDORSEE against maker of a note. It had been indorsed to the plaintiff by another indorsee in pencil; and the question on the trial was, whether the latter was an indorsement in writing, according to the usage and custom of merchants, sufficient to give the plaintiff a title to sue as indorsee. On the trial of the cause, a verdict was found for the plaintiff, subject to this question. It was contended, that all the cases say that an indorsement must be in writing; but then came the question, what was a writing? If the known and accustomed means of writing were departed from, where was the alteration to stop? In one of the ecclesiastical cases, reference had been made to the circumstance of the dying soldier, who made his will on the sand with the point of his sword. That might well be allowed, because he might, by the then law, have dictated it verbally. If one departure from the practice were permitted, it would be difficult to refuse another. The next might be an indorsement made by mere scratches on the surface without colour; and next, perhaps, an indenting with the nails, a mode probably more durable than the transitory marking with a pencil. Such an indorsement as the present was never known before; and a Court of law should take notice of and give effect to the daily and approved practice of writing, as observed by all civilized mankind.

A bill need not be written in ink.

The Court, without referring to any of the authorities on either side, observed that there was none which declared that an indorsement must be in ink. The indorsement in pencil, though unusual and inconvenient, still admitted of a character being given to the handwriting; and they did not apprehend that much danger or inconvenience would result from their maintaining this indorsement, as people would, in general, be careful and not receive instruments which were conveyed by such slight and perishable evidence of title.

(c) AS TO THE DATE.

BEGGIE *v.* LEVI, M. T. 1830. Ex. 1 Cr. & J. 180.

AN indorsee of a bill of exchange dated on a Sunday brought an action against the acceptor. There was no evidence of the bill being accepted on that day—

A bill dated on Sunday is not void on that ground.

The Court held, that the indorsee could recover; that the bill

* A letter, requesting plaintiff to let the bearer have £—, and place it to the writer's account, is not a bill of exchange. (*Little v. Slackford*, E. T. 1828, N. P., 1 M. & M. 171). But an instrument, which directs the drawee to pay without acceptance, is, nevertheless, a bill of exchange. (*Regina v. Kinneer*, 2 M. & Rob. 117).

itself, if proved to have been made and accepted on that day, would not have been void, it being an act not in the exercise of an ordinary calling, within the meaning of the statute 29 Car. 2, c. 7.

ANDERSON *v.* WESTON, M. T. 1839. C. P. 7 Bing. N. S. 296.

The date on the bill must be deemed the true date, unless the contrary appears; and then it becomes a question for the jury.

IN an action against the drawers and indorsers of a bill, one of whom suffered judgment by default, the other alleging that he never drew nor indorsed the bill, relying on a dissolution of partnership, but which was not advertised nor notice given until seven weeks after the date of the bill—

The Court held, that, unless the date of the bill was impeached by evidence, it was to be considered the true date; and that, with respect to the indorsement, which bore no date, it was for the jury to say whether the circumstances satisfied them that the bill had been issued shortly after the time it bore date.

(d) THE SIGNATURE.

GEORGE *v.* SURREY, E. T. 1830. N. P. M. & M. 516.

The signature may be by any mark*.

ANN Moore drew the bill by her mark, and it was indorsed by mark; the writing, "Anne Moore, her mark," on the indorsement, being in the plaintiff's hand. A witness was called to prove the indorsement, who stated he had frequently seen Anne Moore make her mark and so sign instruments; and he pointed out some peculiarity.

Tindal, C. J., admitted the evidence as sufficient.

(e) AS TO THE WORDS "VALUE RECEIVED."

HOLLIDAY *v.* ATKINSON, E. T. 1826. K. B. 5 B. & C. 501;
S. C. 8 D. & R. 163.

The words "value received" import a legal consideration, unless rebutted.

No consideration being proved in an action by an infant against the executor of the maker of a note expressed for "value received," the Judge told the jury that the words "value received" imported a legal consideration, and that affection for the payee, or friendship for his father, or a desire to avoid the legacy duty, amounted to a legal consideration. On motion for a new trial, the Court held, that they had been misdirected, inasmuch as the considerations pointed out were insufficient; and, as the jury might have presumed a good consideration, yet, as that may be rebutted, a new trial was granted.

(f) CONSTRUCTION OF†.

* An instrument drawn by A. upon B., requiring him to pay to the order of C. a certain sum, at a certain time, "without acceptance," is a bill of exchange, and may be so described in an indictment for forgery. (*Patteson, J.—Regina v. Kinnear*, 2 M. & Rob. 117).

† A bill drawn in another country payable in England: "sterling," means "sterling" in that part of the kingdom where payable. (*Taylor v. Booth*, E. T. 1824, N. P., 1 C. & P. 236).

II. RELATIVE TO THE FORM AND CONSTRUCTION OF A NOTE*.

(a) AS TO THE LANGUAGE.

LOVELL *v.* HILL, M. T. 1833. N. P. 6 C. & P. 238.

ACTION on a promissory note, whereby the defendant promised "to pay, or cause to be paid, 130*l.*" It was objected, that the document was not a note. But—

"I promise to pay, or cause to be paid 130*l.*;"

Gurney, B., said, this is a note and may be declared on as such.

GREEN *v.* DAVIES, E. T. 1825. K. B. 4 B. & C. 235; S. C. 6 D. & R. 306; S. C. 1 C. & P. 451.

IN assumption on the following instrument:—

"Received of A. B. 100*l.*, which I promise to pay on demand, with lawful interest. J. DAVIES."

or "received of A. 100*l.*, which I promise to pay on demand;"

It was contended, that the instrument declared on was not a promissory note, no payee being named in it. It acknowledges a debt, and it is no more than a mere accountable receipt.

But the Court held it to be a promissory note. There can be no doubt, that no particular form of words is necessary to constitute a note. *Chadwick v. Allen*, (2 Stra. 706), shews that the payee need not be more explicitly named. The substance of the note there being—"15*l.* 5*s.*, balance due to Sir A. Chadwick, I am still indebted, and do promise to pay;" though no payee was in terms stated, yet as no other was named, who but Sir A. C. could be the party to whom the promise was made? Here, the money being had from A. B., he must be the only person to receive it back.

ELLIS *v.* MASON, E. T. 1839. B. C. 7 D. P. C. 598.

IN an action on the following document:—"John Mason, 14th February, 1836, borrowed of Mary Ann Mason, his sister, the sum of 14*l.* in cash, as per loan, in promise of payment of which I am truly thankful for, and shall never be forgotten by me, John Mason, your affectionate brother, 14*l.*" The question was, whether this document amounted to a promissory note or not. The Sheriff decided that it was and required stamping, and the plaintiff was accordingly nonsuited.

or an acknowledgment of a loan in these words:—"In promise of payment of which sum, I am thankful for, and shall never be forgotten;"

And *Williams*, J., held the nonsuit right.

SHRIVELL *v.* PAYNE, E. T. 1840. B. C. 8 D. P. C. 441.

"MEMORANDUM, that I, Benjamin Payne, had 5*l.* 5*s.*, for one month, of my mother and Shrivell, from this date, to be paid by me to her, Benjamin Payne." An objection was taken to this instrument, that it required a stamp as a promissory note. The undersheriff overruled this objection, and a verdict was found in favour of the plaintiff for 5*l.* 5*s.* The present rule was obtained on the ground of misdirection.

or "that I, A. B., had £— for one month of my mother, and from this date to be paid by me to her," is a promissory note.

Coleridge, J., held that it was a promissory note, and required a stamp as such.

* Semble, a note for a sum under 5*l.*, payable to bearer only, is not a negotiable instrument within 17 Geo. 3, c. 30, which requires attestation. (*Quarterman v. Green*, T. T. 1823, N. P., 1 C. & P. 92).

HORNE *v.* REDFEARNE, E. T. 1838. C. P. 4 *Bing. N. S.* 433;
S. C. 6 *Scott*, 260.

But a memorandum—"I have received £—, which I borrowed of you, and I have to be accountable for the said sum, with legal interest*," is not a promissory note.

THIS was a case submitted for the opinion of the Court, whether the following document was a promissory note or an agreement:—"Sir,—I have received this sum of 20*l.*, which I have borrowed of you, and I have to be accountable for the said sum, with legal interest."

Per Cur.—This case can be decided by referring to the words of the statute 55 Geo. 3, c. 184, and without making any reference to the numerous cases to which our attention has been called; and, according to the conclusion at which we have arrived, the instrument in question is not a promissory note within the provisions of the Stamp Act, not being payable at any particular time, or upon demand. There are to be found, in the enactment, certain instruments to be described as promissory notes, upon which certain duties are to be paid; and, at the end of the scale of the duties imposed, the Legislature says—"And the following instruments shall be deemed and taken to be promissory notes, within the intent and meaning of this schedule, viz. all notes promising the payment of any sum or sums of money out of any particular fund which may or may not be available, or upon any condition or contingency which may or may not be performed or happen, if the same shall be made payable to the bearer or to order, and if the same shall be definite and certain and not amount in the whole to 20*l.*" And we think, that the instrument which forms the subject of discussion is not within the meaning and intention of the statute.

(b) AS TO ITS BEING WRITTEN IN INK. See ante, p. 227.

(c) THE SIGNATURE. See also ante, p. 228.

FERNES *v.* BOND, T. T. 1833. K. B. 4 *B. & Ad.* 671.

A note, "I, A. B., promise to pay," signed "A. B. or else C. D.," is a good note against A. B.

THIS was an action on the following note:—"I, J. C., promise to pay J. E., or his order, 50*l.* with interest, at six months' notice. Dated &c. (Signed) J. C. or else C. D."

The Court held, that it was no note against C. D., but binding as a note on J. C.

(d) SHOULD BE FOR THE PAYMENT OF MONEY ONLY.

BOLTON *v.* DUGDALE, E. T. 1833. K. B. 1 *N. & M.* 412; S. C. 4 *B. & Ad.* 619.

An instrument, promising to

"RECEIVED and borrowed of Timothy Bolton, labourer, in Blackburne, in the county of Lancaster, the sum of 30*l.*, which I do

* But "I promise to account with A. B., or order, for 50*l.*, value received by me," has been held a good note within the statute. (*Morris v. Lee*, *Ld. Raym.* 1396; 1 *Stra.* 629; 8 *Mod.* 362, S. C.). So, "I do acknowledge myself to be indebted to A. in £—, to be paid on demand, for value received," was, after solemn argument, held to be a good note within the statute, the words "to be paid" amounting to a promise to pay; the Court observing, that the same words in a lease would amount to a covenant to pay rent. (*Cashborne v. Dutton*, S. N. P. 371; *Brooks v. Elkins*, 2 *M. & W.* 74).

hereby promise to pay, together with the interest at the rate of 5*l.* per cent. I also promise to pay the demands of the sick club at Haworth, in the county of York, in part of interest, and the remaining stock and interest to be paid on demand to the said Timothy Bolton, his executors, administrators, or assigns." It was stamped with an agreement stamp. It was contended, that it was a promissory note, and not an agreement.

Per Cur.—This is not a promissory note. The amount to be paid to the sick club was uncertain.

See Smith v. Nightingale, 2 *Stark.* 367.

pay a certain sum, and also engaging to pay an unliquidated demand;

AYREY v. FEARNSIDES, T. T. 1838. Ex. 4 *M. & W.* 168; S. C. 6 *D. P. C.* 654.

DECLARATION on a promissory note made by the defendant, by which he promised to pay to the plaintiff, or order, £—, for value received, with interest, &c., and all fines according to rule.

Per Cur.—This instrument cannot be declared upon as a promissory note. It contains a promise to pay a specific sum, and something else. The additional words cannot be rejected, for they are not clearly insensible. They must import that something further is to be paid. Then, if so, the fines alluded to are probably pecuniary fines. At all events, they are something plus the money secured, and, therefore, this is not a note.

or a promise in writing to pay £—, with interest, "and all fines according to rule;"

DAVIES v. WILKINSON, E. T. 1839. Q. B. 2 *P. & D.* 256; S. C. 10 *Ad. & E.* 98.

W. GAVE D. a paper by which he "agreed to pay" a certain sum by four fixed instalments, on certain specified days. As these instalments did not make up the whole amount agreed to be paid, the paper went on thus—"the remainder 95*l.* to go as a set-off for an order of R. to T., and the remainder of his debt owing from D. to him." For the plaintiff, it was insisted, that either it was an agreement, and might be admitted in evidence under an agreement stamp, which was actually upon it, or that it was a simple I. O. U., and was then admissible in evidence without any stamp at all, as evidence under the count on an account stated. The Judge would not stop the cause on this objection, but took a note of it, and the plaintiff had a verdict. A rule was obtained to set aside this verdict, and enter a nonsuit.

or to pay a certain sum by instalments, and the balance of that sum to go as a set-off for a claim by A. against B.;

Per Cur.—It has been objected in this case, that this instrument was improperly received in evidence, for that it was a promissory note, and not an agreement. It is a note up to a certain point, but there its resemblance to a note ends. It then loses the character of a note, and becomes an agreement; and having an agreement stamp upon it, we think that it was properly received in evidence.

CLARK v. PERCIVAL, T. T. 1831. K. B. 2 *B. & Ad.* 660.

AN instrument, purporting to be a promissory note, was given by a man and his wife, payable on demand, to the father of the wife, "for value received in stock of ale, &c., this being intended to stand against me and the undersigned Mary, as a set-off for that sum left me in my father's will above my sister Ann's share 1200*l.*"

or an instrument, reciting, "that certain things named in the note were

received in value of 1200*l.*, which is to constitute a set-off;"

Per Cur.—All that we can collect upon the face of the declaration is, that the note was intended to be a set-off against some claim. It is not a note certainly payable at all events; and therefore it is an agreement.

ROBINS *v.* MAY, M. T. 1839. Q. B. 3 P. & D. 147.

or a memorandum,—“to be held as a collateral security for any monies owing to the holders from A. B., if the securities then or afterwards placed in their hands should not be realised,” —is not a promissory note.

“DEVONPORT, June 22, 1837.—At twelve months after date, I promise to pay Messrs. Robins, Foster & Co., 500*l.* to be held by them as collateral security for any monies now owing to them by Mr. Joseph Malachy, which they may be unable to recover on realising the securities they now hold, and others which may be placed in their hands by him. Thomas May.” It was contended, there is here a clear contingency, for it depends on intermediate occurrences, not only whether the instrument itself is to be paid, but whether or not the amount is to be realised to the payees. (*Ayrey v. Fearnside*s, 4 Mee. & W. 169).

Per Cur.—This is a conditional promise, and the instrument, therefore, not a promissory note; it gives notice to all the world that it is payable on a contingency.

WISE *v.* CHARLTON, E. T. 1836. K. B. 6 N. & M. 364; S. C. 4 Ad. & E. 786.

But the words at the end of the note, “and I have deposited title-deeds as a collateral security for the same,” do not render it inoperative as a note*.

“ON demand, I promise to pay Mr. J. O. Johnson, or order, the sum of 120*l.*, with lawful interest for the same, for value received; and I have deposited in his hands title-deeds to lands purchased from the devisees of W. Toplis, as a collateral security for the same.” On this was affixed a promissory note stamp of sufficient value, and a mortgage stamp of 2*l.* had been affixed upon payment of the penalty since the commencement of the action.

Per Cur.—We do not find any thing in the instrument to qualify the payment of 120*l.* What follows is a mere memorandum, that the title-deeds were deposited as a collateral security. The promissory note stamp having been affixed before the making of the note was sufficient to entitle the plaintiff to recover on it.

(e) SHOULD NOT BE PAYABLE ON A CONTINGENCY.

RICHARDS *v.* RICHARDS, T. T. 1831. K. B. 2 B. & Ad. 413.

The contingency, to vitiate, must appear on the face of the note.

A WIDOW, administratrix of her husband, married again, and lent her second husband money which she had in her character of administratrix. The husband and two other persons, as his sureties, gave the wife a promissory note, payable, with interest, to her. She survived her second husband.

The Court held, that, although no action could have been brought on the note during his life, she having survived was entitled to maintain an action upon it against the surviving makers.

* An instrument, by which the defendant bargained and agreed to give £— for a cart, and to pay at a certain day, held to be an agreement, and not a promissory note. (*Ellis v. Ellis*, 1 Gow, N. P. 216).

“I promise to pay to A., or bearer, on demand, 16*l.* at sight by giving up debts, &c.” is a promissory note, if the jury thought the debts had been given up. (*Dixon v. Nuttall*, H. T. 1834, N. P., 6 C. & P. 320; S. C. 1 C., M. & R. 307; S. C. 4 Tyrw. 1013; not S. P.).

(f) CONSTRUCTION OF.

NORTON *v.* ELLAM, E. T. 1837. Ex. 2 *M. & W.* 461.

THE declaration was on a promissory note in the following form:—
 “I promise to pay 200*l.* on demand, with lawful interest.” It appeared no demand had been made.

A note payable with interest on demand is a present debt, and the Statute of Limitations runs from the date*.

Per Cur.—A promissory note payable on demand is payable without any demand, being a present debt, and the statute runs from the date of it; adding the words, “with interest,” makes no difference. A note payable at sight, by the terms of the contract, must be shewn before action brought; that was the case of *Holmes v. Kerrison*, 2 Taunt. 323.

III. RESEMBLANCE BETWEEN BILLS AND NOTES.

EDIS *v.* BURY, E. T. 1827. K. B. 6 *B. & C.* 433; S. C. 2 *C. & P.* 559; S. C. 9 *D. & R.* 492.

WHETHER the defendant was entitled to be discharged out of custody or not depended upon the question, whether the instrument in question was a bill of exchange, or was a promissory note. In words it was a promissory note, by which the drawer promised to pay to the order of B., and B. (the defendant) signed it. A person of the name of G., (who, as the defendant contended, was the acceptor), had written his name across; at least, it was so presumed, but the name so written was not proved to be the handwriting of G., nor was there any evidence of a presentment to him.

If the language of a bill or note does not clearly express which, it may be treated as either†.

Abbott, C. J., was of opinion, that this was not a bill of exchange, therefore that no laches could be attributable to the plaintiff; and, consequently, he had a verdict. And—

The Court thought, that, where an instrument of this nature was equivocal, and the language ambiguous, the holder might treat it as either a bill or a note. If it were otherwise, those who issued such instruments would be encouraged to commit fraud. Here the holder had treated it as a note.

See 4 *B. & Ald.* 212; 4 *Tyrrw.* 450.

IV. RELATIVE TO VERBAL OR COLLATERAL CONTRACTS CONTROLLING OR VARYING A BILL OR NOTE.

ADAMS *v.* WORDLEY, E. T. 1836. Ex. 1 *M. & W.* 374.

ASSUMPSIT by drawer against acceptor of two bills. The defendant pleaded an agreement, not stated to be in writing, between him and the plaintiff, before the making of the bills, for discharging defendant from a former action on another bill, (on payment of a sum and costs, and of accepting the bills), in case the plaintiff should

The terms and effect of a bill cannot be varied by a contemporaneous oral contract.

* See also p. 349.

† A bill of exchange, drawn by a party on himself, is in the nature of a promissory note. (*Roach v. Ostler*, M. T. 1827, K. B., 1 *M. & R.* 120). So, “I promise to pay,” addressed, in the margin, to the defendant who accepted it, may be deemed a note. (*Block v. Bell*, 1832, N. P., 2 *M. & M.* 149).

recover on the bill against another party, and that, until he should so recover or fail, payment of the latter bills should not be called for, averring that he had paid such sum and costs and accepted the two bills, and that the suit against such third party was still undetermined.

The Court held it bad on demurrer, as varying an absolute contract by a contemporaneous oral contract inconsistent therewith.

BRILL *v.* CRICK, H. T. 1836. Ex. 1 M. & W. 232.

So, a memorandum indorsed on a bill, purporting to make it conditional, does not alter its legal intentment and effect *.

A PROMISSORY note, payable on demand, was given in evidence with an agreement, whereby it had been agreed that the note should be given by way of security, to secure a judgment if it should be recovered against a third person, and to be given up if the plaintiff, who was the payee, should fail in that action. A memorandum was indorsed on the note, stating, that this note was given on the condition mentioned in the agreement. The defendant pleaded a special plea by way of inducement, the agreement, the note, and the memorandum indorsed on it, in the exact terms; and, after averring that the instrument in the declaration alleged to be a promissory note had been stamped as a promissory note, and not as an agreement, concluded with a traverse of the promise in the declaration alleged.

The Court held, that this indorsement was to be considered as merely a marking of the note for the purpose of identification, and not as an incorporating of the agreement, so as to render the note an agreement or a conditional promise.

FOSTER *v.* JOLLY, H. T. 1835. Ex. 1 C., M. & R. 703; S. C. 5 Tyrw. 239.

So, the time of payment expressed in the bill cannot be extended,

A NOTE was given, payable fourteen days after date. In an action against the defendant, he produced parol evidence, that the note was not to be enforced if a verdict were obtained in a suit between other parties for the actual subject-matter of the consideration. On the part of the plaintiff, it was objected, that this evidence was inadmissible, because it went to contradict the terms of the note; and it was also contended, that the plaintiff was not restrained from enforcing the note, unless he obtained the fruits of the verdict, which he had not, as the defendants in that action had recovered their property.

And by the Court.—The note contains a promise to pay fourteen days after date; the defendant, by his evidence, says, “No, I have agreed to pay fourteen days after date, *but only on a contingency;*” that is parol evidence contradictory to the instrument, and cannot be received.

* If the memorandum make the payment contingent, that must be incorporated in the note. (*Leeds v. Lancashire*, 2 Camp. 205; *Hartley v. Wilkinson*, 4 M. & S. 25; S. C. 4 Camp. 127). But where it is merely directory, as if it point out the place of payment; (*Exon v. Russell*, 4 M. & Selw. 505); or be merely the expression of an intended courtesy, as if it intimate a wish that the money lent should not be called in by the payee's executors till three years after his death; (*Stone v. Metcalfe*, 4 Camp. 217); or if it import that a collateral security (as the deposit of title-deeds) has been given; (*Wise v. Charlton*, 4 Ad. & E. 786); or be intended only to identify and ear-mark the instrument; (*Brill v. Crick*, 1 M. & W. 232, *supra*); it does not affect its operation.

MOSELEY v. HANFORD, E. T. 1830. K. B. 10 B. & C. 729.

ACTION on a promissory note, on the face of it payable on demand.—Evidence, that, at the time it was made, the parties agreed it should not be payable until the payee gave up possession of certain premises (part of the consideration).

as that payment should not be demanded until certain premises were given up;

Per Cur.—Evidence, that the note, which purported to be payable on demand, was in fact not to be paid until possession was given to the defendant of certain premises purchased by him, could not be received since the case of *Woodbridge v. Spooner*, (3 B. & Ad. 233). There, as to a promissory note, on the face of it purporting to be made payable on demand, parol evidence was held to be not admissible to shew, that, at the time of making it, there was an agreement that it should not be payable until the decease of the maker. We think the principle concurs with the authority of that case; and we are all of opinion, that the evidence in question, in this case, was not admissible.

SANDERSON v. PIPER, T. T. 1839. C. P. 7 Scott, 408; S. C. 7 D. P. C. 632; S. C. 5 Bing. N. S. 425.

THE plaintiffs declared on a bill of exchange for 245*l.*, and delivered particulars for the same amount; but, on being produced, the figures in the margin of the bill were 245*l.*, whilst the words in the body of the bill were 200*l.* On the trial, no application was made to amend the declaration. On a special case, the question was, whether the evidence given at the trial which proved the sum to be 245*l.* was admissible, the plaintiffs were to be entitled to recover in this action either the sum of 245*l.*, with interest, or the sum of 200*l.*, with interest. If the Court should be of opinion that the plaintiffs were entitled to recover either of these sums, a verdict was to be entered accordingly. If the Court should be of opinion, that the plaintiffs were not entitled to recover any sum from the defendants, a nonsuit was to be entered.

or the amount enlarged by parol evidence.

The Court decided, that the bill was a bill for 200*l.* only.

ABBOT v. HENDRICKE, M. T. 1840. C. P. 2 Scott, N. S. 183.

ASSUMPSIT on the following note:—"Two years after date, I promise to pay to P. H. Abbott, or order, 500*l.*, for value received for commission due to him on business transacted for me. J. Hendricks." Plea, that the defendant made and delivered the note in consideration of certain services to be thereafter done and rendered by the plaintiff for and on behalf of the defendant, and for no other consideration whatever; and that the plaintiff had not done and rendered the said services for and on account of the defendant, but had neglected so to do, and by reason thereof the consideration for making the said note had wholly failed; and the plea averred that there was no consideration, save and except as aforesaid.

But where the consideration is expressed on the face of the note, parol evidence may be given to shew its failure.

Per Cur.—We have always understood the law to be, that, in an action by the payee against the maker of a promissory note, that is to say, between the original parties, the maker might shew either that there had been no consideration, or a failure of consideration. In this case, when the note was given, there was, most likely, an in-

tention of services between the parties; but, taking the plea to be proved, no services were in fact rendered, and the consideration has wholly failed. You may either prove that the consideration has failed, or that there was originally no consideration. If, when a note imports to be given for value received, you may shew that value was not received; so when a specific consideration is stated, you may shew that such consideration did not exist.

CARR *v.* STEPHENS, T. T. 1829. K. B. 9 B. & C. 758; S. C. 4 M. & R. 590.

So, a written memorandum on a separate piece of paper, varying the liabilities of the parties, is binding between them*.

THE defendant was the receiver appointed by the Court of Chancery in a suit, out of which one H. and his wife, in right of the latter, were entitled to certain funds. The plaintiff having a claim upon the husband induced the defendant, with the assent of the husband, to accept the bill in question, it being understood, that, before the bill became due, the defendant would be in funds, as receiver, to meet it. The wife gave no authority for the acceptance. Before the bill became due, the husband and wife demanded their money from the defendant, and he paid it over to them before the commencement of this action. After the bill became due, and before the money was paid over, there was a treaty between the plaintiff and defendant on the subject, and the plaintiff gave the defendant an indemnity against any proceedings which might be taken against him for the money by the husband and wife. The defendant received the indemnity, but afterwards refused to pay.

Per Cur.—It would be mere circuity of action for the plaintiff to recover upon the bill, and then for the defendant to recover back on the indemnity, which he certainly could do; for he was bound to pay the money upon the order of the husband and wife. If the bill had passed into the hands of an indorsee, the defendant would be bound by his acceptance, and must then have resorted to his indemnity. It is unnecessary to drive him to that, when both parties are before the Court.

V. RELATIVE TO THE STAMP ON A BILL OR NOTE†.

(a) WHEN NOT NECESSARY WHERE AN AGREEMENT STAMP.

See, also, ante, pp. 231, 232.

EMLY *v.* COLLINS, T. T. 1818. K. B. 6 M. & Selw. 144.

A DEBTOR, about to sell his goods, sent a letter to the auctioneer, directing him to pay out of the produce of the goods a sum due to E., with interest, on a warrant of attorney, and a further sum due

An order for the payment of money out of a particular

* And an agreement between indorsee and indorser, that he shall sue the acceptor only, is binding between the immediate parties. (*Pike v. Street*, T. T. 1828, N. P., 1 M. & M. 226).

† Before the 33 Geo. 3, bills and notes were written on a plain piece of paper unstamped. By a statute made in that year, certain duties were imposed on every piece of vellum, parchment, or paper, on which bills and notes, falling under certain descriptions, should be written, engrossed, or printed. By a subsequent act, 55 Geo. 3, c. 184, s. 1, all the former duties are repealed, and others imposed in their stead. By sect. 2, of that act, it is enacted, that "there shall be raised, levied, and paid, unto and for the use of his Majesty, his heirs, and successors, in and throughout the whole of Great Britain, for and in respect of the

for goods, adding, "for which said several sums, the receipt of the said E. shall be a good discharge." fund requires a bill stamp.

The Court held it to be an order for payment of money out of a

several instruments, matters, and things, mentioned and described in the schedule thereunto annexed, or for or in respect of the vellum, parchment, or paper, upon which such instrument, matters, and things, or any of them, shall be written or printed, the several duties or sums of money set down in figures against the same respectively, or otherwise specified and set forth in the same schedule, and that the said schedule, and all the provisions, regulations, and directions therein contained with respect to the said duties, and the instruments, matters, and things charged therewith, shall be deemed and taken to be part of that act, and shall be received and construed as if the same had been inserted therein at this place, and shall be applied, observed, and put in execution accordingly." And the schedule of the same act imposes the following duties on an

"Inland bill of exchange, draft, or order to the bearer, or to order, either on demand or otherwise, *not exceeding two months after date*, or sixty days after sight, of any sum of money—

Amounting to £2	and not exceeding £5 5s.	....	0	1	0
Exceeding .. 5 5s.	—	20	....	0	1 6
— .. 20	—	30	....	0	2 0
— .. 30	—	50	....	0	2 6
— .. 50	—	100	....	0	3 6
— .. 100	—	200	....	0	4 6
— .. 200	—	300	....	0	5 0
— .. 300	—	500	....	0	6 0
— .. 500	—	1000	....	0	8 6
— .. 1000	—	2000	....	0	12 6
— .. 2000	—	3000	....	0	15 0
— .. 3000	—	—	....	1	5 0

"Inland bill of exchange, draft, or order for the payment to the bearer, or to order, at any time *exceeding two months after date*, or sixty days after sight, of any sum of money—

Amounting to £2	and not exceeding £5 5s.	....	0	1	6
Exceeding .. 5 5s.	—	20	....	0	2 0
— .. 20	—	30	....	0	2 6
— .. 30	—	50	....	0	3 6
— .. 50	—	100	....	0	4 6
— .. 100	—	200	....	0	5 0
— .. 200	—	300	....	0	6 0
— .. 300	—	500	....	0	8 6
— .. 500	—	1000	....	0	12 6
— .. 1000	—	2000	....	0	15 0
— .. 2000	—	3000	....	1	5 0
— .. 3000	—	—	....	1	10 0

"Inland bill, draft, or order for the payment of any sum of money, though not made payable to the bearer or to order, if the same shall be delivered to the payee, or some person on his or her behalf

The same duty as on a bill of exchange for the like sum payable to bearer or order.

"Inland bill, draft, or order for the payment of any sum of money, weekly, monthly, or at any other stated periods, if made payable to the bearer or to order, or if delivered to the payee, or some person on his or her behalf, where the total amount of the money thereby made payable shall be specified therein, or can be ascertained therefrom

The same duty as on a bill payable to bearer or order on demand for a sum equal to such total amount.

"And where the total amount of the money thereby made payable shall be indefinite

The same duty as on a bill on demand for the sum therein expressed only.

"And the following instruments shall be deemed and taken to be inland bills, drafts, or orders for the payment of money, within the intent and meaning of this schedule, viz. all drafts or orders for the payment of any sum of money by a bill or promissory note, or for the delivery of any such bill or note in payment or satisfaction of any sum of money, where such drafts or orders shall require the payment or delivery to be made to the bearer or to order, or shall be delivered to the payee or some person on his or her behalf.

particular fund, within 53 Geo. 3, c. 184, sched. pt. 1, requiring an inland bill stamp; and that the latter direction did not raise any condition or contingency to vary the effect.

"All receipts given by any banker or bankers, or other person or persons for money received, which shall entitle, or be intended to entitle, the person or persons paying the money, or the bearer of such receipts, to receive the like sum from any third person or persons.

"And all bills, drafts, or orders for the payment of any sum of money out of any particular fund which may or may not be available, or upon any condition or contingency which may or may not be performed or happen, if the same shall be made payable to the bearer, or to order, or if the same shall be delivered to the payee or some person on his or her behalf.

"*Foreign bill of exchange*, (or bill of exchange drawn in but payable out of Great Britain), if drawn singly and *The same duty as on an inland bill of the same amount and tenor.*

"Foreign bills of exchange, drawn in sets according to the custom of merchants, for every bill of each set, where the sum made payable thereby shall not exceed

	£	s.	d.
£100	0	1	6
And where it shall exceed 100 and not exceed 200	0	3	0
— 200 — 500	0	4	0
— 500 — 1000	0	5	0
— 1000 — 2000	0	7	6
— 2000 — 3000	0	10	0
— 3000	0	15	0

"And the following duty on a *Promissory Note* for the payment to the bearer on demand of any sum of money—

	£	s.	s.	d.
Not exceeding 1 1	0	5		
Exceeding .. 1 1 and not exceeding £2 2s	0	10		
— .. 2 2 — 5 5s	1	3		
— .. 5 5 — 10	1	9		
— .. 10 0 — 20	2	0		
— .. 20 0 — 30	3	0		
— .. 30 9 — 50	5	0		
— .. 50 0 — 100	8	6		

"Which said notes may be re-issued, after payment thereof, as often as shall be thought fit.

"Promissory note for the payment, in any other manner than to the bearer on demand, but not exceeding two months after date, or sixty days after sight, of any sum of money—

	£	s.	d.
Amounting to £2 and not exceeding £5 5s	1	0	
Exceeding 5 5s. — 20	1	6	
— 20 — 30	2	0	
— 30 — 50	2	6	
— 50 — 100	3	6	

"These notes are not to be re-issued after being once paid.

"Promissory note for the payment, either to the bearer on demand, or in any other manner than to the bearer on demand, but not exceeding two months after date, or sixty days after sight, of any sum of money—

	£	s.	d.
Exceeding £100 and not exceeding £200	0	4	6
— 200 — 300	0	5	0
— 300 — 500	0	6	0
— 500 — 1000	0	8	6
— 1000 — 2000	0	12	6
— 2000 — 3000	0	15	0
— 3000	1	5	0

"The notes are not to be re-issued after being once paid.

DAVIES v. WILKINSON, E. T. 1839. Q. B. 2 P. & D. 256; S. C. 10 A. & E. 98.

R. GAVE D. a paper, by which he “agreed to pay” a certain sum, by four fixed instalments, on certain specified days. As these instalments did not make up the whole amount agreed to be paid, the paper went on thus:—“the remainder 95*l.* to go as a set-off for an order of R. to F., and the remainder of his debt owing from D. to him.”

An agreement to pay a certain sum by instalments, the residue to go as a set-off, is an agreement, and not a note*.

The Court held, that this paper was properly stamped as an agreement, and declared on as such; and that it was also admissible in evidence as proof of a debt on a count for an account stated.

“Promissory note for the payment to the bearer or otherwise, at any time *exceeding two months* after date, or sixty days after sight, of any sum of money—

		£	s.	d.
Amounting to £2 2s. and not exceeding £5 5s.		0	1	6
Exceeding .. 5 5s.	20	0	2	0
— .. 20 ..	30	0	2	6
— .. 30 ..	50	0	3	6
— .. 50 ..	100	0	4	6
— .. 100 ..	200	0	5	0
— .. 200 ..	300	0	6	0
— .. 300 ..	500	0	8	6
— .. 500 ..	1000	0	12	6
— .. 1000 ..	2000	0	15	0
— .. 2000 ..	3000	1	5	0
— .. 3000 ..		1	10	0

“These notes are not to be re-issued after being once paid.

“Promissory note for the payment of any sum of money by instalments, or for the payment of several sums of money at different days or times, so that the whole of the money to be paid shall be definite and certain. { *The same duty as on a promissory note, payable in less than two months after date, for a sum equal to the whole amount of the money to be paid.*

“And the following instruments shall be deemed and taken to be promissory notes within the intent and meaning of this schedule, viz.—

“All notes, promising the payment of any sum or sums of money out of any particular fund, which may or may not be available; or upon any condition or contingency, which may or may not be performed or happen; if the same shall be made payable to the bearer or to order, and if the same shall be definite and certain, and not amount in the whole to 20*l.*

“And all receipts for money deposited in any bank, or in the hands of any banker or bankers, which shall contain any agreement or memorandum, importing that interest shall be paid for the money so deposited.

“But such of the notes and instruments here exempted from the duty on promissory notes shall, nevertheless, be liable to the duty which may attach thereon, as agreements or otherwise.

“*Exemptions from the preceding, and all other stamp duties:—*

“All promissory notes or bills, for the payment of money, issued by the Governor and Company of the Bank of England, Commissioners of the Navy, Commissioners for Victualling the Navy, or Commissioners for the Transport Service.”

* The following letter, sent to the holder of the fund out of which payment is to be made, does not require a bill stamp:—“We now authorize you to pay to Messrs. R. & Co., (having revoked the former order in their favour), after you have paid yourselves the balance we owe you from the net proceeds of our shipments to your foreign establishments to the present date, one half of the remainder of the proceeds of said shipments, provided the same shall not exceed the sum of 5000*l.* H. & J.” (*Hutchenson v. Heyworth*, 1 P. & D. 266; Abr. post, tit. *Contract*). A note written by a creditor at the foot of an account, requesting the debtor to pay that account to A. B., and which the creditor delivered to A. B., for the purpose of his getting in the money of the creditor, is not a bill of exchange or order for payment of money within the Stamp Act. (*Maule, J.—Norris v. Solomon*, MSS.)

FIELD *v.* HOOD, T. T. 1837. K. B. 7 *Ad. & E.* 114.

The provisions of the 31 Geo. 2, c. 23, as to stamping bills and notes, &c., are incorporated in the 8th sect. of the 55 Geo. 3.

Per Littledale, J.—THE stat. 31 Geo. 3, c. 25, has enacted, that no bill of exchange shall be given in evidence that is not duly stamped. If the counsel were right in stating that the 55 Geo. 3, c. 184, did not include the provisions contained in the previous statute, there might be some doubt in this case; but it certainly does include it.

(b) EFFECT OF NOT BEING STAMPED.

SWEETING *v.* HALSE, H. T. 1829. K. B. 9 *B. & Cr.* 365.

A renewal of an old bill written on its back without a fresh stamp, cannot be received in evidence.

IN an action by the drawer against the acceptor of the original bill, it appeared that, when the original bill became due, it was agreed to be renewed, and a similar instrument was written on the back of the first, and accepted by the defendant; but there was no fresh stamp, and the name of the acceptor was erased from the first bill.

The Court held, that, to shew the cancellation to have been with the assent of the drawer, the substituted instrument ought not to have been submitted to the inspection of the jury to enable them to draw a conclusion from an unstamped instrument.

(c) EFFECT OF AN IMPROPER STAMP.

JARDINE *v.* PAYNE, H. T. 1831. K. B. 1 *B. & Ad.* 663.

Where a bill is improperly stamped, and the defect is sought to be cured by admissions in letters from the defendant to acceptor, identity of the bill with the letters must be shewn without resorting to the bill.

IN an action by the indorsee against the acceptor, the declaration containing also the money counts, the stamp turned out to be insufficient, and the bill could not be read; but two letters were produced from the defendant; the first addressed "To the gentleman that calls with the bill," expressing his regret at not being able to take up the bill for £—, and desiring the holder to allow him to renew it for a month; and the second, (being an answer to an application by the attorney, requiring payment of the bill in favour of Mr. T., for £—, but not stating in whose behalf the application was made), in which the defendant stated that it was impossible he could take up the bill, but that if T. would draw at one month, he should then be prepared.

The Court held, that, there being nothing in the letters acknowledging a liability to the plaintiff, nor admitting him to be the holder, the plaintiff was bound to shew, by proof of the indorsement on the bill, that he was entitled to it; and no proof of the indorsement, without proof also of the contents of the bill to identify it with the contents of the defendant's letter, would be sufficient. The contents of the bill was a necessary part of the plaintiff's title, and could not be looked at by the jury to ascertain that fact.

See Bishop v. Chambre, 1 Dan. & Lloyd, 83.

(d) AT WHAT TIME TO BE STAMPED.

GREEN *v.* DAVIES, E. T. 1825. K. B. 4 *B. & C.* 235; S. C. 1 *C. & P.* 451, 675; S. C. 6 *D. & R.* 306.

A note must be stamped before

IN an action on a promissory note, it appeared, on the face of a note, that it had been issued without having affixed to it a stamp

of the legal amount; and also, that, since its issue, a penalty had been paid and a 1*l.* agreement stamp affixed, though bearing no particular denomination on the face of it.

The Court held, that the commissioners had no power to affix another stamp after it had been issued; and that it was, therefore, not receivable in evidence, either in support of the count on the promissory note, or of the account stated.

it is issued, it cannot be afterwards, unless it be of a proper amount, though not the specific denomination.

(e) AMOUNT OF DUTY PAYABLE, AND HOW REGULATED.

ARMITAGE *v.* BERRY, E. T. 1829. C. P. 5 *Bing.* 501; S. C. 3 *M. & P.* 211.

A PROMISSORY note thus:—"On demand, we, jointly and severally, promise to pay J. G., or order, the sum of 100*l.*," &c. The note being stamped with a 3*s.* 6*d.* stamp only, it was objected, on the part of the defendant, that it ought to have had an 8*s.* 6*d.* stamp, as coming within the first class of promissory notes mentioned in the statute 55 Geo. 3, c. 184.

But the Court held, that statute, requiring the larger rate of duty, only applied where the note was payable to "bearer" on demand, and not to "order."

The 55 Geo. 3, c. 184, requiring the larger duty, only applies to where the note is payable on demand to the bearer,

MOYSER *v.* WHITAKER, E. T. 1829. K. B. 9 *B. & C.* 409.

THIS was an action on a promissory note for 100*l.* and interest, made payable to M. S., or order, on demand. The stamp on this note was 3*s.* 6*d.* It was objected, on the authority of the case of *Keates v. Whieldon*, (8 *B. & C.* 7; 2 *M. & R.* 8, by the name of *East v.* —), that the stamp was insufficient; subject to this point, the plaintiff obtained a verdict—

But the Court held it to fall within the second class in the schedule of the Stamp Act, as a note payable in any other manner than to bearer on demand, but not exceeding two months after date.

and not on demand to A. B., or order;

CHEETHAM *v.* BUTLER, M. T. 1833. K. B. 5 *B. & Ad.* 837; S. C. 2 *N. & M.* 453, overruling *KEATES v. WHIELDON*, E. T. 1828. K. B. 8 *B. & C.* 7; S. C. 2 *M. & R.* 8.

ACTION on the following promissory note:—"I promise to pay to A. B. the sum of 100*l.*, value received." This note was upon a stamp of 3*s.* 6*d.*, and, on its being objected at the trial that it should have been on a stamp of 8*s.* 6*d.*, by the 55 Geo. 3, c. 184, sched., part 1, as being a note payable to the bearer on demand, on the authority of the cases of *Whitlock v. Underwood*, (2 *B. & C.* 157), and *Keates v. Whieldon*, (8 *B. & C.* 7), Lord Denman, C. J., nonsuited the plaintiffs, with liberty, however, to the plaintiffs to move to set aside the nonsuit and enter a verdict for 80*l.* On motion for that purpose—

Per Lord Denman, C. J.—The rule must be absolute. I am glad to find that the doubts entertained at *Nisi Prius* have been formerly

or where no time is named*.

* In a case in the Bankruptcy Court, where a bill was payable to A. B. or order, on demand:—Held, not a bill payable to bearer on demand; and, therefore, within the second class of the schedule requiring the lower stamp. (*Ex parte Robinson*, 1 *D. & C.* 275).

entertained in this Court, though I was not aware of it at the time. It certainly did appear to me, on principle, that the case of *Keates v. Whieldon* could not be supported; and that is the clear opinion of all the Court.

EAST v. —, E. T. 1828. K. B. 2 M. & R. 8—S. C., by name of KEATES v. WHIELDON. 8 B. & C. 7.

Before the preceding case, a note for 11l. 10s., payable to bearer on demand, required a 2s. stamp.

THIS was a promissory note for 11l. 10s., made payable "on demand to the bearer with interest, for value received." The note, when produced, appeared to bear a 1s. 6d. stamp. It was contended, on the part of the defendant, that it ought to have borne a 2s. stamp to satisfy the provisions of the 55 Geo. 3, c. 184. Lord Tenterden, C. J., considered the objection valid, and, accordingly, nonsuited the plaintiff—

And the Court refused to interfere. In this promissory note there is no fixed limited time for payment; it is payable *on demand*. It is also payable to bearer, and does, as it seems to us, fall within the description of the part of the schedule referred to, and, consequently, ought to bear a 2s. stamp. If it did not come within the operation of this part of the schedule, it would be left out altogether.

DIXON v. CHAMBERS, H. T. 1835. Ex. 1 C., M. & R. 845, overruling KEATES v. WHIELDON, E. T. 1828. K. B. 8 B. & C. 7; S. P. CHEETHAM v. BUTLER, M. T. 1833. K. B. 5 B. & Ad. 837; S. C. 2 N. & M. 453—S. P. WILLS v. NOOT, T. T. 1834. Ex. 4 Tyrw. 726.

A note payable to "A. on demand, with interest until payment," is within the lower rate of stamp duty.

By a promissory note, A. promised to pay B., on demand, 20l., with lawful interest until payment, for value received. The note, when produced, appeared to be stamped with a stamp of 1s. 6d., whereupon it was objected, for the defendant, that the stamp ought to have been 2s. instead of 1s. 6d. The case of *Keates v. Whieldon*, (8 B. & C. 7), was relied on.

Per Cur.—That case has been expressly overruled. (See *Cheetham v. Butler*, 2 N. & M. 453; 5 B. & Ad. 837, S. C.) A promissory note of this description falls within the second class of notes payable otherwise than to bearer, within two months after date.

(f) OF POST DATING.

WILLIAMS v. JARRATT, T. T. 1833. K. B. 5 B. & Ad. 32; S. C. 2 N. & M. 49.

The date stated in the sched. 55 Geo. 3, c. 184, means the date expressed on the face of the bill, and not when it actually issued.

THIS was an action on a bill of exchange. The defence was, that the bill had been post dated, so as, in effect, to be due at a time exceeding two months, although it had only a stamp which would serve for two months. (The Stamp Act, 55 Geo. 3, c. 184, sched., part 1, *Bill of Exchange*, requiring a higher stamp on a bill exceeding two months date). Evidence was given, shewing that the bill had been issued before the day it bore date, and more than two months before it would become due.

Per Cur.—Section 12 applies only to the penalty for post-dating, and does not make the bill void. The case of *Upstone v. Marchant*,

2 B. & C. 10, is in point, as the Court there decided that the word "date," as used in the schedule to the Stamp Act, must be taken to mean the date appearing on the *face of the bill*.

(g) WHEN ANOTHER SURETY JOINS.

CATTIN *v.* SIMPSON, H. T. 1838. Q. B. 3 N. & P. 248.

THIS was an action on a promissory note. It appeared that the plaintiff and defendant had signed a note as principal and surety, and, after issuing, the name of a third party was added, with consent of all parties, as an additional surety.

The Court held it not a material alteration, so as to require an additional stamp.

Where, after a note was signed by principal and surety, an additional surety joins:—Held, not to require another stamp.

(h) WHEN DRAWN IN ENGLAND AND ACCEPTED BY A PARTY RESIDING ABROAD.

AMNER *v.* CLARK, T. T. 1835. Ex. 2 C., M. & R. 468.

DECLARATION on a bill of exchange for 312*l.*, drawn by A. B. upon the defendant, accepted by him, payable in London, and indorsed by A. B. to the plaintiff. Averment of a presentment for payment and dishonour. Plea—That the defendant did not accept the bill of exchange. It was stamped with a 4*s.* stamp only. It was proved on the trial, that the defendant was a merchant residing at Brussels. An objection was taken to the bill, on the ground that the stamp was insufficient and ought to have been 8*s.* 6*d.* To this it was answered, that it was a foreign bill, and therefore the stamp was sufficient.

A bill drawn in England, accepted payable in London by a person residing at Brussels, requires an inland bill-stamp.

Per Cur.—This bill, which is drawn in England, and is payable in England, does not fall within the definition of a foreign bill of exchange, as given in the Stamp Act. It ought, therefore, to have been stamped as an inland bill.

(i) EXEMPTION FROM DUTY*.

VI. RELATIVE TO THE CAPACITY OF THE CONTRACTING PARTIES TO A BILL OR NOTE.

(a) AGENTS†.

ATTWOOD *v.* MUNNINGS, T. T. 1827. K. B. 7 B. & C. 278; S. C. 1 M. & R. 66.

A PERSON, going abroad, executed a power of attorney to three A party taking

* A memorandum subjoined to a bill of parcel of goods:—"Mr. S., please to pay above account to Messrs. A.," signed S., is not a bill of exchange or order for the payment of money within the Stamp Act. (*Norris v. Solomon*, 1837. N. P., 2 M. & R. 266). So, where the consignor of goods gave his consignee this order:—"Pay to A. B. the proceeds of a shipment of goods, value about 2000*l.*, consigned by me to you;" and C., by writing, agreed to pay over the full amount of the net proceeds of the goods, it was held, that neither of these instruments required a bill or note stamp. (*Jones v. Simpson*, 2 B. & C. 318; and see *Barlow v. Broadhurst*, 4 Moore, 471).

† General authorities to transact business and to receive and discharge debts,

a bill accepted by an agent, is bound to ascertain his authority; if not, he takes it at peril;

persons, one of them being his wife, appointing them to act as well in respect of his trade as of his private affairs. By a subsequent power, executed while he was abroad, he authorized his wife to act on his behalf, giving her very extensive powers to sell and exchange lands, and "to accept such bills as should be drawn or charged on him by his agents or correspondents, as occasion should require." At this time he was connected in extensive mercantile business and joint speculations with persons residing in England. The joint creditors at that time becoming urgent, one of the firm applied to the wife, who was acting under the power of attorney, to accept several bills for some of the partnership debts, which she did. The bills were drawn by the partner who so applied, and in his own name; he was, at that time, "a correspondent" of the husband, as well as a partner; but he was not a correspondent in respect of those bills, nor did it appear that he had any authority to draw them; nor that any "occasion required" their being accepted, except the fact that the creditors were urgent.

The Court held, that the power of attorney did not authorize the wife to accept those bills, as they would render her husband liable pro tanto to the partnership debts; and, consequently, that the holder of one of the bills could not recover; it is the duty of a person taking a bill signed by an agent, to inquire into his authority, as a party taking a bill accepted by procuration takes it at the peril of the agent being authorized.

BASTABLE v. POOLE, M. T. 1834. Ex. 1 C., M. & R. 410.

and may be liable to his principal.

A DRAWER delivered a bill to his agent to be discounted; the agent indorsed the bill as his own to the defendant, a bill-broker, who procured it to be discounted, but handed over to the agent only a portion of the proceeds. The drawer being afterwards obliged to take up the bill, sued the defendant for money had and received to the drawer's use.

The Court held, that he was entitled to recover, and that a representation by the agent, that the bill was his own, would not preclude the principal from recovering, but only subject him to any defence which the defendant might have set up against the agent.

do not confer upon an agent the power of accepting or indorsing bills, so as to charge his principal. (*Hogg v. Smith*, 1 Taunt. 347; *Murray v. East India Company*, 5 B. & Ad. 204; and see *Howard v. Baillie*, 2 H. Bla. 618; *Gardner v. Baillie*, 6 T. R. 591; *Kilgour v. Finlyson*, 1 H. Bla. 155; *Hay v. Goldsmidt*, 2 Smith's Rep. 79; *Esdaile v. Lanaure*, 1 Y. & Col. 394).

An agent or bill-broker, intrusted to discount, has no right to pledge the bill as a security for money previously due from himself. (*Haynes v. Foster*, 2 C. & M. 237). And it is very doubtful whether an usage entitling him to do so would be legal. (*Foster v. Pearson*, 1 C., M. & R. 849). *Primâ facie*, a bill-broker has no right to pledge the bills of his different customers in one mass; for that might subject a bill to a lien beyond the amount advanced upon it. (*Haynes v. Foster*, 2 C. & M. 237). But the usage of a particular district may enlarge the authority of a bill-broker to give him a right to pledge the bills of different customers in one mass. (*Foster v. Pearson*, 1 C., M. & R. 849). Such is the usage of bill-brokers in the city of London; and, as such, it is not an unreasonable one; for, although it may occasionally be attended with inconvenience, yet, on the other hand, the bill-broker may often raise money on a large scale on better terms than a small one, or discount, with other bills, bills which alone could not be discounted at all. (*Ibid.*)

JONES *v.* TURNOUR, H. T. 1830. N. P. 4 C. & P. 204.

THE declaration on a bill alleged it to have been drawn by one H. P. on and accepted by the defendant, and afterwards indorsed by the said H. P. to the plaintiffs. The bill appeared to be indorsed "Per pro. H. P.," in the handwriting of one J. P.; and a witness stated that his employers had dealings with H. P., and that he had seen bills drawn and indorsed in the same form and handwriting, which had been paid.

Lord *Tenterden*, C. J., was of opinion, that, upon a question of authority, the statements of the witnesses were admissible without the production of such bills; and the Court, after an affidavit that the *real* name was H. P., and that the bill was drawn and indorsed by her son, J. P., by her authority, refused to set aside a verdict for the plaintiff.

An agent's authority to sign bills may be proved without production of the bills,

PRESCOTT *v.* FLINN, T. T. 1832. C. P. 9 Bing. 19; S. C. 2 M. & Scott, 18.

THE defendants' confidential clerk had been accustomed to draw bills and cheques for them by procuration; and it was proved, that, in one instance, he had authority to indorse; and in two other instances, that the defendants had received money obtained by his indorsing in their name. A jury found that the clerk had a general authority to indorse.

by shewing that he was occasionally in the habit of doing so.

Per Cur.—It may be admitted, that an authority to draw does not import in itself an authority to indorse bills; but still, the evidence of such authority to draw is not to be withheld from the jury, who are to determine, on the whole of the evidence, whether such authority to indorse exists or not. The jury, although they may require some direct testimony upon the authority of the clerk to indorse, may justly be satisfied with less evidence, where it is proved that the clerk is a confidential clerk, and that he has an undisputed authority to *draw* in the name of the principals. And as well this part of the evidence, as also the direct evidence of authority to indorse, was left to the jury. When, therefore, the evidence on this subject was left to a special jury of merchants, who have the right to bring their own knowledge of the general course of business in aid of their judgment on the particular occasion, and they have declared themselves satisfied that the defendants have, by their conduct, shewn that this clerk had authority to indorse, with what object could we send this cause to a second trial before a jury of a similar description, where the very same question must again be left to the new jury upon the same evidence?

WILSON *v.* BARTHOOP, T. T. 1837. Ex. 2 M. & W. 863.

IN an action on a bill of exchange, it appeared that the defendant was clerk of one Halliday, who was surviving partner of a firm trading under the name of Jonathan Barthrop & Son. Jonathan B. died about the end of the year 1835; the son (who was the second partner) was also dead, and the defendant was employed by their executors and Halliday, as a confidential clerk, to wind up the business. A conversation with him was given in evidence, by which it appeared that he had, on former occasions, drawn bills in the name

Where a clerk to a firm, in winding up the affairs on the close of his employment, draws a bill in the name of the firm, if *bonâfide*, he is not personally liable,

of the firm, but had guarded himself against any personal liability by not putting his own name to them. The plaintiffs contended, that, unless this bill was drawn and indorsed by authority of Halliday, the defendant was liable; and that it was a question for the jury, whether he was so authorized. But the learned Judge, considering that some proof should be given by the plaintiffs of want of authority, directed a nonsuit—

And the Court refused to interfere.

POLHILL *v.* WALTER, H. T. 1832. K. B. 3 *B. & Ad.* 114—S. P.
 SOWERBY *v.* BUTCHER, H. T. 1834. Ex. 2 *C. & M.* 368.

But a party who assumes the character of an agent, and, as such, accepts a bill without authority, may be sued for the fraud, but cannot as acceptor of the bill.

THIS was an action by the indorsee of a foreign bill of exchange, in three parts, drawn by J. B. Fox, and directed to E. H. The first count stated that the defendant “falsely, fraudulently, and deceitfully, did represent and pretend that the defendant was duly authorized by the said E. H. to accept the first part of the bill of exchange, according to the usage, &c., and by the procuration of the said E. H., to whom the same was so directed as aforesaid; and did then and there falsely and fraudulently pretend to accept the same by the procuration of the said E. H.” It alleged, as special damage, the costs of an action brought by the plaintiff against E. H., as acceptor. It appeared that the bill being presented for acceptance, the drawee being absent, the defendant, upon its being stated that the bill was regular, and believing that it would be paid, accepted it by procuration, no authority ever having in fact been given; the bill being dishonoured, the holder, having sued the drawee and been nonsuited, brought an action against the defendant for having fraudulently pretended that he was duly authorized to accept it. The jury having negatived all fraud—

The Court held, that a party making a representation known to be untrue, and which is intended or calculated to induce another to act on the faith of its being true, so as to sustain damage thereby, is guilty of fraud in law, and to be deemed to have intended to make such representation to all who received the bill in its course of circulation; but that the defendant could not be charged as acceptor; a party can only be so when the bill is addressed to him, or where he accepts it for honour.

(b) COMPANIES, PUBLIC.

DICKINSON *v.* VALPY, M. T. 1829. K. B. 10 *B. & C.* 128.

The secretary of a company cannot bind its members by bills, unless an authority be shewn.

IN an action against a member of a joint-stock company, by an indorsee of a bill drawn by the secretary upon the company, and accepted by order of the directors—

The Court held, that, in the absence of the deed of settlement of the company, shewing any authority of the directors to draw or accept any bills, or those in the particular form amounting to promissory notes, or that it was necessary for the carrying on the concern that they should do so, it was not competent for them to bind the individual members of the company; and that the plaintiffs, having notice of the nature of the bill, could not recover.

NEALE *v.* TURTON, E. T. 1827. C. P. 4 *Bing.* 149.

THE plaintiff, a shareholder in a joint-stock company, drew two bills on the directors for the goods supplied for the use of the company; which bills were accepted by the secretary per procuration of the directors. On proof that the secretary had directions to accept bills drawn by the plaintiff's brother—

He has no general authority to do so.

The Court held, that the plaintiff could not recover as against the directors, on the ground, that the secretary had no authority to accept the bills drawn by the plaintiff; and that, as he was a shareholder, he must be considered as a partner in the concern, and as such could not sue his co-partners.

BRAMAH *v.* ROBERTS, T. T. 1837. C. P. 3 *Bing. N. S.* 963.

IN an action by the plaintiffs, indorsees of a bill of exchange, drawn by a director of a joint-stock company upon, and accepted by the chairman for self and directors, it having appeared that the defendants, since they became members of the association, neither paid nor sanctioned the payment of any bills of exchange, except such as though drawn before were payable after they became directors, and which were given for services done to the company; and that no bills had been given since some of the defendants became directors, but all payments had been made in cash; and there being no evidence given by the plaintiffs of the constitution of the company, nor of any authority given by deed or otherwise to any one of the directors to bind the other directors, or to bind the company at large by his acceptance of bills of exchange—

So, the chairman of a joint-stock company cannot bind the shareholders by his acceptance, unless under an authority by deed or their sanction.

The Court held, that the chairman of the board of directors had no implied authority to bind the company at large by his acceptance of bills of exchange, and that payment by members of the company of bills so accepted before they became members was properly found by a jury, as holding out no liability on similar bills issued after they became members.

FAITH *v.* RICHMOND, H. T. 1840. Q. B. 3 *P. & D.* 187.

IN assumpsit upon a note payable "at the London and Westminster Bank, 9, Waterloo-place," and signed, "for the Newcastle Coal Company, William Richmond, manager;" to which the plea was, that the defendants did not make the note; it appeared, that the usual style of the defendant's firm was, "The Newcastle and Sunderland Wall's End Coal Company," and that they kept no account at the London and Westminster Bank in Waterloo-place. Richmond was a partner in the firm, and had authority to sign notes in the name of the firm.

And where a company, not by their usual name, accepted a bill payable at a bank where they had no account:—Held, it was for the jury to say whether it was drawn with the consent of the firm.

Per Cur.—If the note had been drawn in the usual name of the firm, it clearly would have bound all of them. Then, however fraudulently the bill was drawn by Richmond, yet, as regards the plaintiff, who was a bonâ fide holder when it was out in the world, and substantially represented the partnership, although their designation was altered in some slight respects, it would bind the firm. In *Williamson v. Johnson*, (1 B. & C. 146; S. C., 2 D. & R. 281), *Holroyd, J.*, says,—“It seems to me, that evidence of an agent's handwriting would, as between third persons, have been sufficient without any proof of usage on his part to indorse bills in this

manner." The struggle at the trial was, whether the parties were partners at all, and that was distinctly proved. It was too narrow a question for the jury to consider, whether the other defendants had given Richmond authority to make this note.

(c) EXECUTORS AND ADMINISTRATORS*.

RICHARDS *v.* RICHARDS, E. T. 1832. K. B. 4 B. & Ad. 447.

An administratrix, who lends her husband money, and takes his note, in which A. and B. join, after her husband's death A. and B. are liable to the administratrix.

MONEY belonging to the wife, as administratrix, was lent on a joint note of her husband and two others.

The Court held, first, that the note was not void, although during the husband's life no legal proceedings could be maintained upon it; that being a mere chose in action, and not having been reduced into possession during the husband's life, it survived to the wife; and that the uncertainty in whom the right of action would vest, viz. in the wife, or in her representative if she died before her husband, was not such a contingency as would make the note void.

(d) HUSBAND AND WIFE.

PRESTWICK *v.* MANHALL, T. T. 1831. C. P. 7 Bing. 565; S. C. 5 M. & P. 13; S. C. 4 C. & P. 594.

A married woman, with the consent of her husband, may indorse a bill in her own name.

IN an action on a bill of exchange, it appeared that the wife, by her husband's authority, signed and indorsed the bill in her own name.

Per Bosanquet, J.—I am of opinion, that the wife's indorsement, if approved by her husband, is binding upon him: it is positively proved in this case that the husband assented to the act of the wife. And, on the case coming before the Court, they concurred with *Bosanquet, J.*

GOLDSTONE *v.* TOVEY, M. T. 1839. C. P. 6 Bing. N. S. 98; S. C. 8 Scott, 394.

But the mere fact of the money being applied in discharge of the husband's debts, is not evidence of an authority.

IN an action against the defendant, as acceptor of a bill of exchange, accepted as supposed by his wife, but no evidence was given in whose handwriting the acceptance was written—

The Court held, that the circumstance of the bill having been paid by the drawer, and the amount of it obtained on discount by the defendant's wife having been applied by her in discharge of the defendant's debts, was not sufficient to prove that the defendant had approved the acceptance.

* If executors give a promissory note, payable *with* interest on demand, they are personally liable, though they make it expressly "as executors," and though they have fully administered the testator's assets. (*Childs v. Monins*, H. T. 1821, C. P., 5 Moore, 282; S. C. 2 B. & B. 460). So, if they indorse a bill or note, or if it be indorsed to them as executors, they may sue upon it as such. (*King v. Thom*, M. T. 1786, K. B., 1 T. R. 487). And it has been holden, that if A., empowered by an executor to settle the concerns of the estate, accept in the name of the executor a bill drawn by a creditor, he thereby binds the executor personally. (*Howard v. Baillie*, H. T. 1796, C. P., 2 H. Bl. 618). But, in a subsequent case, it was determined, under a power of attorney to act for an executor as such, that the party cannot accept bills so as to bind the executor personally. (*Gardner v. Baillie*, H. T. 1797, K. B., 6 T. R. 591).

MASON v. MORGAN, M. T. 1834. K. B. 2 *Ad. & E.* 30; S. C. 4 *N. & M.* 46.

INDORSEE against maker, the note was payable to S., the wife of J. B. An indorsement by J. B. being proved, it was objected, that, as the name of Sarah Barnard appeared upon the face of the note, she ought to have joined her husband in indorsing it.

A note payable to the wife may be indorsed by the husband alone.

Per Cur.—In the case of *M'Neilage v. Holloway*, (1 B. & A. 218), the bill was given to an unmarried woman, and it was held, that no indorsement was necessary by her to vest the right to sue upon it in the husband. This is a shorter case; the note is given to the wife, the right to transfer it was immediately vested in the husband, and his indorsement is sufficient without his wife's joining.

GALERS v. MADERLEY, E. T. 1840. Ex. 6 *M. & W.* 423.

ASSUMPSIT on a promissory note. The first count in the declaration stated, that the defendant made his promissory note, and delivered the same to Elizabeth Robinson. The second count stated a making of another promissory note in the lifetime of Elizabeth Robinson, by delivery to her, stating a promise to pay her as executor. Plea—that the notes were the same note, and that it was given to Elizabeth Robinson whilst she was covert and the wife of John Robinson, since deceased; and that the consideration was money advanced by E. R. whilst she was the wife of J. R., and that E. R. was not executrix or administratrix. Replication—that, after the making and delivery of the note to E. R., and during her lifetime, the said J. R. died, without having in his lifetime done any act to reduce the note into possession, or to prevent or defeat the right of survivorship in E. R. in the note, in the event of his dying in the lifetime of E. R. Demurrer—The grounds were, that it was not necessary that John Robinson should reduce the note into possession; that the money advanced by Elizabeth Robinson must be considered as having been advanced by her as her husband's agent; that she therefore acquired no interest in the note, and could have no right by survivorship.

But, if the wife finds the money, and the husband does not reduce the note into his possession before his death, it vests in his wife after his death.

Per Cur.—The plea is bad. This is an action brought upon a promissory note, and no one can sue on it, unless he be a party to it, or has obtained it by lawful transfer. Properly speaking, a promissory note is not a chose in action, but an instrument which derives its character from the custom of merchants and the statute of Anne. Where a note is given to a wife, her husband may take it, and, after reducing it into possession, may bring an action upon it; or he may allow his wife to sue in her own name; and if he do not reduce the note into his possession it will come to her by survivorship. No doubt would have arisen as to the law in this case, but for the observations of Lord *Ellenborough* in *M'Neilage v. Holloway*, (1 B. & A. 218), he, however, was mistaken in that case, and indeed was not called upon to give any opinion on the point. A husband makes his wife's note his own by bringing an action upon it; that step is equivalent to an indorsement by him to himself. In this case no act of that kind has been done by the husband. The proper person to sue was the executor of the wife. Whether the husband could compel an account from the party who had received the husband's money as a consideration for the note, is quite a different

matter. But, although the money in this case belonged to the husband, that cannot vary the right of action; our judgment must be for the plaintiff.

(e) INFANTS.

HUNT v. MASSEY, H. T. 1834. K. B. 3 N. & M. 109.

A ratification of a bill, made by an infant after he comes of age, is binding.

THE defendant accepted a bill when under age. The defendant became of age 19th June, 1832, and the bill fell due on the 4th July 1832. The plaintiff produced a letter in the handwriting of the defendant, which was dated on the 22nd June, 1832, addressed to a third person, requesting him to pay the plaintiff £101, out of a sum left to the defendant by his grandfather. It was objected to, on the part of the defendant, that the declaration did not contain any special count founded on the promise to pay, made after the defendant became of age.

Per Cur.—The new promise need not be declared on specially.

(f) PARTNERS.

LLOYD v. ASHLEY, H. T. 1831. K. B. 2 B. & Ad. 23; S. C. 2 C. & P. 138, *semble contra*, p. 251.

A bill, accepted by the firm, binds a recently admitted secret partner, if for partnership purposes; and

THE payee of a bill, who had previously dealt with A., R., and O., carrying on business under the style of A. & Co., after the retirement of O. and introduction of S., (but whose name, by agreement, was not to appear), into the partnership, received a bill addressed to A. & Co., and which was accepted by the partnership in the name of A. and R., under which the new firm was carried on.—The Court held that S. being at the time interested in the partnership, and no fraud found, the acceptance was binding on all, notwithstanding the variance in the names of the firm to whom addressed, and in which the bill was accepted.

VERE v. ASHBY, M. T. 1829. K. B. 10 B. & C. 288.

whether for the purposes of the firm or not, if the holder did not know of the circumstances.

THE defendant, by an agreement for a partnership with A. and B., on the 24th June agreed that he was considered copartner from the 18th May previously, but that his name should not appear; and he continued a partner until the 21st September following. The plaintiffs, who before and after the agreement had been the bankers of the firm, discounted one bill for them on the 21st May, and two others on the 13th July, and placed the amount to the partnership account, but were ignorant of the defendant being a partner until the winding up of the account.

Per Cur.—The general rule is, that where the partnership name is pledged to a creditor, every actual partner is liable to have his individual credit pledged thereby; and a party making an advance on the credit of the partnership name is entitled to sue all the parties, unless he be privy to a misapplication of the advance by the one who receives it as for private purposes. There is here no suggestion of fraud against the plaintiffs.

LLOYD v. ASHBY, M. T. 1825. N. P. 2 C. & P. 138.

ONE partner accepted a bill in the name of his firm, but not in a partnership transaction. In an action by the indorsee on such acceptance against S., a dormant partner, whose name did not appear, and who was not known to be a partner, nor the bill taken on his credit—

Semble contra, as regards a dormant partner.

Abbott, C. J.—If S. had been known to be a partner, I should have held that it was taken on his credit, and that, unless there was fraud in the plaintiff, he would be entitled to recover on it against S.; but as the plaintiff did not know that S. was a partner, and as he could not have taken the bill on S.'s credit, I am of opinion that the plaintiff cannot recover.

GREENSLADE v. DOWER, H. T. 1828. K. B. 7 B. & C. 635; S. C. 1 M. & R. 460; S. C. DICKINSON v. VALPY, 10 B. & C. 128; S. C. 5 M. & R. 126.

A. AND B. having agreed with C. to take a farm, and to pay for the stock, &c., at a valuation, by bills at three months; and C. becoming subsequently unable to attend to the business, A. and C., without the knowledge or consent of B., entered into a new agreement to pay part in cash, and the remainder by bills at six and twelve months, which A. accepted for himself and B. The Court held that B. having never ratified the giving such bills by A., the mere joint occupation of the farm by himself and A. could not operate by relation so as to render the bills binding on him, contrary to the terms of the original contract, and without his assent.

But one of several partners in a farming concern cannot bind his co-partners without authority.

SOUTH CAROLINA BANK v. CASE, T. T. 1828. K. B. 8 B. & C. 427.

ONE partner of a firm in England proceeded to a foreign country, for the purpose of establishing a branch concern, to be carried on in his individual name, with strict instructions that the names of the firm should appear as little as possible on paper, and that no greater sum than £—— should at any time be risked on partnership speculations: he, however, against those instructions, entered into risks greatly exceeding that sum, and indorsed bills in the course of such dealings in his own name, the firm in England subsequently sanctioning them; and the transaction being for the benefit of the partnership, the Court held, that such indorsements were to be deemed the indorsements of the firm in the name used by them for the purpose of the foreign business.

If one partner only signs his name, though for partnership purposes, the firm are liable, if sanctioned by them.

SPARROW v. CHISMAN, H. T. 1829. K. B. 9 B. & C. 241; S. C. 4 M. & N. 206.

A PARTNER in a banking-house, for his own accommodation, drew bills upon the defendant, and caused the defendant to accept them, he (the partner) undertaking to provide for them; and afterwards, being indebted to the firm of which he was a member, he indorsed them for a valuable consideration to the firm. The Court held, that an action on the bill could not be maintained by the firm, of which that partner was one, because the facts of the case are such, that one of several plaintiffs could not recover against the defendant. If the

Where A. draws a bill in his own name, and indorses it to the firm, they cannot sue if A. could not.

cause of action were considered as accruing to him alone, he cannot sue in conjunction with the plaintiffs, although they may not have been parties to the facts, which would deprive the other plaintiff from suing alone.

(g) SPIRITUAL PERSONS.

HALL v. FRANKLIN, H. T. 1838. Ex. 3 M. & W. 259.

Before 1 Vict. c. 10*, spiritual persons, composing a banking company, could not be a party to a bill or note, under 57 Geo. 3.

THIS is an action brought against the defendant, as drawer and indorser of a bill of exchange, by George Hall, as one of the public officers of certain persons united in copartnership, for the purpose of carrying on business as bankers in Manchester and elsewhere, by the name and description of the Northern and Central Bank of England, under and by virtue of, and according to, the form and effect of the stat. 7 Geo. 4, c. 46, for "the better regulating Copartnerships of certain Bankers in England."

The defendant pleaded, that the bill of exchange was made and indorsed and delivered to the plaintiff; and the promise in the declaration mentioned was made by the defendant after the passing of the statute, intituled "An Act to consolidate and amend the Laws relating to Spiritual Persons holding of Farms, and for enforcing the Residence of Spiritual Persons on their Benefices, and for the support and maintenance of Stipendiary Curates in England;" that two persons, of the names of Richard Barnett and Rowland Blaney, were spiritual persons, and were partners concerned in the carrying on the said copartnership or banking company; that the said trade is carried on as well for the gain and profit of the said two spiritual persons, as of the several other persons concerned; that the indorsement and delivery of the bill by the defendant to the said co-partnership were and are a contract made by the defendant with the said copartnership, so including and comprehending these two spiritual persons, in the way of their trade or business of a banker, as well for their gain and profit as for the gain and profit of the several other persons members thereof; and the same with respect to the promises, contrary to the form of the statute. To this plea the plaintiff demurred.

Per Cur.—The question arises upon the construction to be given to the stat. 57 Geo. 3, c. 39, which enacts, "That no spiritual person shall, by himself or by any other for himself, or to his use, engage in or carry on any trade or dealing for gain or profit, or deal in any goods, wares, or merchandises, by buying and selling for lucre, gain, or profit in any market, fair, or other place, upon pain of forfeiting the value of such goods, wares, and merchandises, by him or any to his use bargained and bought to sell again, contrary to the provisions of this act. And that every bargain and contract so made by him, or by any to his use, in any such trade or dealing, contrary to this act, shall be utterly void and of none effect." The defendant contends that the contract is made void by the act of Parliament, inasmuch as spiritual persons are forbidden to trade, and the act has made void all bargains and contracts made by them in any such trade or dealing; that, whether the co-partnership consists of many or few members makes no difference; that these two spiritual persons are equally interested with the others, and that, if

* Which makes contracts by banking firms valid, though spiritual persons be partners.

this action can be maintained, so it might even if the two spiritual persons were the only partners in the concern. And this was hardly contested by the counsel for the plaintiff; but he contended that banking is not a trade or business in contemplation of the act of Parliament; that this statute of 57 Geo. 3, was intended to consolidate the laws respecting spiritual persons, not to enlarge them; and that this 3rd section was intended to re-enact the 5th and 6th sections of the statute of 21 Hen. 8, c. 13.

Then the 3rd section enacts, "That no spiritual person shall by himself, or by any other for himself or to his use, engage in or carry on any trade or dealing for gain or profit." These words are as general as can be employed,—“any trade or dealing for gain or profit.” It then proceeds to copy the words in the statute of Hen. 8,—“That no spiritual person shall, by himself, or by any other for himself or for his use, engage in or carry on any trade or dealing for gain or profit; and that every bargain or contract so made by him, or by any for his use, in any such trade or dealing, contrary to this act, shall be utterly void and of none effect.” The words in the latter part of the section, “such trade or dealing,” appear to refer to the words “trade or dealing” in the early part of the section. In that part of the section which is copied from the statute of Hen. 8, although the word “deal” is to be found, the word “trade” is not. The part of the clause which is copied from the statute of Hen. 8, except for the purpose of forfeiting the things bought and sold, and bought with the intent to sell, might have been omitted altogether. We have been strongly pressed with the inconveniences that may result from this construction of the statute. We are not insensible to them; but the only proper effect of that argument is to make the Court cautious in forming its judgment. We cannot on that account put a forced construction on the act of Parliament. Judgment for the defendant.

VII. RELATIVE TO THE CONSIDERATION FOR A BILL OR NOTE.

(a) WHAT IS GENERALLY A SUFFICIENT CONSIDERATION, EXPRESS OR IMPLIED.

SOWERBY v. BUTCHER, H. T. 1834. Ex. 2 C. & M. 368.

THE defendant, in the absence of his brother, who was liable to give the plaintiff a bill for goods supplied, signed it in his own name.

The Court held, that he was personally liable; the debt of a third person being a sufficient consideration for which a party may bind himself by bill; and the consideration need not be such as would enable the plaintiff to sue on a special contract.

A consideration which would not suffice for a special contract, may be enough to support a bill of exchange.

PEASE v. HIRST, M. T. 1829. K. B. 10 B. & C. 122.

SEVERAL persons joined in a note payable to a banking-house or order, on demand. The object was to open an account for one of them on the credit of the note. The account went on for several years, the debtor paying interest on account, but the amount of the note was never charged.

A fluctuating balance is a good consideration for a bill.

Per Cur.—The first objection is, that by this note the defendants became sureties only to the house of which the present plaintiffs were then partners, and that, by the change in the firm, their liability ceased. But a banking-house may have a surety-bond given either to the then partners only, or to the present and future partners, notwithstanding any change in the firm. Here, by the form of the instrument, the defendants all put themselves in the character of principals; but, taking it as a suretyship, the security was not intended to be confined to the parties who then composed the firm; if it were, why make it payable to order? The intention was, that the liability should be shifted according to the variations that might take place in the banking firm. There was at one time a balance of 642*l.* in his favour, and it is contended that the debt due on the note has been wiped off by that balance. But it does not appear that this was a cash balance; and, if not, the bankers were clearly under no obligation to apply it to the note in question. But even if it had been a cash balance, were they *bound* to do so? No; for that would be inconsistent with the original intention for which the note was given. The case might be different if the surety had made any application to that effect; but, as it was, there was not in the form of the note any legal obligation on the banker so to apply the balance.

PERCIVAL *v.* FRAMPTON, E. T. 1835. EX. 2 C., M. & R. 180; S. C. 5 *Tywr.* 579.

The taker of a bill in exchange in discharge of a previous debt may properly be described as the holder for a good consideration*.

PLEA, that the note was made and delivered to the defendant, that he might indorse it for the accommodation of the maker, to enable him to obtain advances of money thereon; that the plaintiffs had only advanced a part, and there was no consideration for the residue. Replication, that the plaintiffs were the holders of the note for good and valuable consideration given to the maker, in respect of their being such holders to the full amount. On this issue—

Per Cur.—If the note is given to the plaintiffs, and they hold it as a security for the previous debt, they may be properly stated to be the holders for valuable consideration.

ROFFEY *v.* GREENWELL, T. T. 1839. Q. B. 2 P. & D. 365.

"I promise, for myself and executors, to pay A. £—, one year after my death, with legal interest;" in the absence of evidence to the contrary, the consideration will be presumed.

ASSUMPSIT on a promissory note in the following form:—"I promise, for myself and my executors, to pay to F., or her executors, one year after my death, 300*l.*, with legal interest." No proof of the consideration having been given—

Per Cur.—No proof of the consideration being given, it was admitted, that no case in point could be found, nor any which lays down the rule and principle by which it is to be decided. Generally speaking, an instrument carries interest from its date, whether payable on demand, or at a time specified. The reason is, that the party who makes the promise must be expected to keep it, and, if he does, no interest can be due from any other period than the date. In the present case, there is, indeed, another period from which it might be computed, that of the maker's death; but it appears im-

* If a party give his acceptance, that will be a good consideration for another bill, such acceptance being after all unpaid. (*Rose v. Sims*, H. T. 1831, K. B., 2 B. & Ad. 521; *Abr. post*, tit. *Contract*).

probable that if that was his intention, he should not have expressed it with more distinctness. We think, in the absence of all particular proof, that we must presume the note to have been given for value, so that interest would be due from the date. If that be doubtful, the instrument ought to be construed most strongly against the maker. The plaintiff is, therefore, entitled to the larger sum, and judgment must be entered for it.—Judgment accordingly.

RIDOUT *v.* BRISTOW, M. T. 1830. Ex. 1 Cr. & J. 231; S. C. 1 Tyrw. 84.

A PROMISSORY note was given by a widow, which purported to be "for value received by her late husband." It was objected for the defendants, that, upon the face of it, it appeared to be a voluntary note for the payment of the debt of another person, and being so, and without any consideration as between the parties to it, was consequently void.

The Court held, that the note was valid on the face of it, and that evidence could not be given of a consideration inconsistent with the terms of it.

So, a note, "for value received by my late husband," expresses good consideration on the face of it;

SERLE *v.* WATERWORTH, T. T. 1838. Ex. 4 M. & W. 9; S. C. 6 D. P. C. 684; *but judgment reversed on Error*, 4 M. & W. 795.

To debt on a promissory note, payable twelve months after date, the defendant pleaded, that one J. W., before and at the time of his death, was indebted to the plaintiff in a certain sum, and that the plaintiff, after the death of J. W., and before the making of the note, applied to the defendant for payment thereof; whereupon, the defendant, in compliance with the said request, after the death of J. W., for and in respect of the said debt, and for no other consideration whatever, then made and delivered the note to the plaintiff; that J. W. died intestate, and that, at the time of the making and delivery of the note as aforesaid, no administration had been granted of the estate and effects of the said J. W.; nor was there at that time any executor or executrix of his estate and effects, nor was there any person liable at that time for the said debt so remaining due to the plaintiff as aforesaid.—Replication, *de injuriâ*.

The Court held, that, as the note *primâ facie* imported consideration, the plea was bad, for want of an averment that there were no assets.

Even before she take out administration, is a sufficient consideration.

SPILLER *v.* WESTLAKE, E. T. 1831. K. B. 2 B. & Ad. 155.

A PROMISSORY note, payable on a given day, is made at the same time with an agreement for the sale and conveyance of an estate, of the consideration for which the sum secured by the note is a part. It appeared, in an action on the note, that the estate had not been conveyed, but that the contract of sale remained open.

Per Cur.—It is a good test to try, whether the defence to this action is sustainable, by seeing whether the circumstances are such that the defendant, having paid the 200*l.* as a deposit, would have been entitled to recover it back; but we think it is perfectly clear, that he could not have been so entitled as long as the contract remained open. Now, here, the contract remained open at the time when the action was commenced, for the plaintiffs agreed only to

And a note given for part of the consideration-money of an estate may, when due, be sued on, if the contract of sale still remains open.

convey the estate, subject to the two mortgages. They had not engaged to convey the legal estate to the defendant, but merely the equity of redemption; and that they were willing to convey.

EVANS *v.* MORGAN, E. T. 1832. Ex. 2 Cr. & J. 453; S. C. 2 Tyrw. 396.

And a note between landlord and tenant may be enforced if the jury think the agreement on which it was founded has been completed.

PLAINTIFF, who was the grandson of the deceased tenant of a farm, remained in possession after his grandfather's death. A bargain was made between plaintiff and M., an in-coming tenant, who had agreed to take the farm from the landlord, by which bargain M. was to give the plaintiff 30*l.* for the crops, manure, &c., to be secured by the promissory note of M. and a surety, which note was to be held by D., and was to be by D. attested and handed to the plaintiff, if plaintiff delivered up the possession of the lands on the next morning; but he was to remain in possession of the house for a few weeks, at a rent of 1*s.* a week, to be paid to M. The note was accordingly drawn with a clause of attestation, and was signed by M. and his surety, and handed to D. The next morning, upon M. and D. requesting plaintiff to give up the possession, he refused to give up the *place*; but there was evidence that, on that day, M.'s cattle were on the lands, and that plaintiff's were not. Plaintiff kept possession of the house for three weeks, when he was turned out by a constable. The note was never attested, and it was not proved how the plaintiff got it into his possession.

The Court held, in an action by the plaintiff against the makers of the note, that a jury were warranted in saying, that the bargain had been complied with on the part of the plaintiff.

CROOK *v.* JADIS, M. T. 1833. N. P. 6 C. & P. 191.; S. C. 3 N. & M. 257; S. C. 5 B. & Ad. 909.

But taking a bill under gross negligence as to the consideration, precludes the holder from suing.

THE plaintiff became the holder of a bill, which had been improperly obtained, and previously discounted.

The Court held, that the direction by *Denman*, L. C. J., to the jury, whether the plaintiff took the bill under circumstances amounting to "gross negligence," in which case he could not recover, was proper; and not merely without "due caution," or "under circumstances," as ought to excite suspicion.

SMITH *v.* DE WITTS, T. T. 1827. K. B. 6 D. & R. 120.

A., who receives a bill from B., who had it for a special purpose, cannot, on B.'s absconding, enforce payment from the party who intrusted B.

THE defendant accepted a bill without value, and delivered it to a party for a special purpose, who improperly detained it, and left the country, and, after having become bankrupt, delivered it with other securities to a creditor who had pursued him.

The Court held, that the latter could not be placed in a better situation than the party from whom he received it; and, therefore, was not a *bonâ fide* holder for value; the party, too, having become bankrupt, the property in the bill, if he had any, would have passed to his assignees.

BASSETT *v.* DODGIN, H. T. 1834. C. P. 10 Bing. 40; S. C. 3 M. & Sc. 417.

To render bill void, on the

IN an action by the holder against a prior indorsee, the drawer having been called to prove that neither the acceptor nor the de-

fendant received any consideration for the bill, and that the amount had been obtained through usurious discount by the intervention of a third party, the stepfather of the plaintiff.

The Court held, that, until he was proved to have been the agent of the plaintiff, the consideration had not been so impeached as to compel the plaintiff to prove it to have been good and valuable.

ground of illegal consideration, where done by an agent, his authority must be shewn*.

(b) OF PARTIAL OR TOTAL FAILURE OF CONSIDERATION.

RICHARDS v. THOMAS, M. T. 1835. Ex. 1 C., M. & R. 772.

THE attorney of the mortgagee, upon the interest being in arrear, gave his client a note for the amount of the principal and interest, upon his undertaking to give up the deeds, and hold the note until the sale of the mortgaged premises should be completed:—Held, that it was for the jury to say, what the consideration of the note really was, and whether it totally failed or not.

It is for the jury to decide upon the consideration, and whether it failed or not.

SOLLY v. HINDE, H. T. 1834. Ex. 2 C. & M. 516; S. C. 6 C. & P. 316.

A. APPOINTED B. his executor, and gave him a promissory note, payable on demand, for 100*l.*, in consideration of the trouble he would have in the office of executor after A.'s death. B., however, died first; but his executors brought an action on the note against A. It was held, that, as the consideration for the note had totally failed, the action was not maintainable; the failure of consideration being the same as if none ever existed.

The entire failure of consideration is the same as if none ever existed.

MANN v. LENT, E. T. 1830. K. B. 10 B. & C. 877.

IN an action by the indorsee against the acceptor, after notice to prove the consideration, the defendant proved the note to have been given in part payment of an apprentice-fee with his son, who, after serving five months, upon discovering that the indenture was not sufficiently stamped, left the service.

The Court held, that, as there was not a total failure of consideration so as to constitute a defence against an action by the drawer, those facts, therefore, were no answer to the action by the indorsee; under 20 Geo. 2, c. 45, s. 5, the master or apprentice might procure the indenture to be properly stamped.

A note given as an apprentice-fee may be sued on, where the apprentice, after serving five months, left, because the indentures were not properly stamped.

OBBERD v. BETHAM, H. T. 1830. N. P. 1 M. & M. 483.

THE defendant accepted bills for goods supplied on a contract, "to be of good quality and moderate price."

Tenterden, C. J., held, that it was no answer to the action on the bills, that the goods turned out inferior, and that the defendant had

So, a bill given under a contract for "goods to be of good quality and mo-

* It is not sufficient that the acceptor of a bill of exchange receive some benefit directly from the contract for which he accepted the bill, but the consideration, however small, should be directly from him for whom the bill was accepted. (*Archer v. Bamfield*, 3 Stark. 175).

derate price," is not answered by shewing them to be of inferior quality.

paid to the plaintiff much beyond what they sold for. In an action for the price, the value only can be recovered; but, in an action upon the security, the party holding it is entitled to recover, unless there has been a total failure of consideration.

And where A. gave B. a bill in payment of goods; some time afterwards he resumes forcible possession of the goods:—Held no defence on the bill, trespass being the remedy.

STEPHENS *v.* WILKINSON, E. T. 1831. K. B. 2 B. & Ad. 320.

A BILL of exchange is given in payment for goods; and, some time after they have been in the possession of the buyer, the seller forcibly retakes them. In assumpsit by the payee against the acceptor of the bill—

Per Cur.—We do not think that the subsequent seizure of the goods, after the vendee had so long enjoyed the use of them, was a rescinding of the contract; nor could there be a total failure of consideration for the bill, seeing that the vendee had had some benefit by the use of them. He must bring an action of trespass for damages on account of the seizure.

LEAF *v.* GIBBS, M. T. 1830. N. P. 4 C. & P. 466.

A defendant, who, as surety, undertakes to sign several notes, if others would do so also, and they refuse:—Held, it was for the jury to say, whether he intended to hold himself liable notwithstanding.

THE defendant agreed to join with three others in several notes to the plaintiff, to secure a debt; but, after he had signed one, refused, and never did in fact sign the rest of the notes, nor did his co-sureties.

Tindal, C. J., said to the jury:—The question for your consideration is, whether the defendant intended to waive the objection as to all the notes or not; for, if he did, and obtained time in consequence, then he will be liable. If you think that the defendant, knowing all the circumstances, waived the objection, then you will find the verdict for the plaintiff; if you do not think so, then for the defendant.

(c) WHEN ILLEGALITY VITIATES.

1. *By Common Law.*

DE BEGNIS *v.* ARMISTEAD, E. T. 1832. C. P. 10 Bing. 107; S. C. 3 M. & Scott, 501.—S. P. HALL *v.* FRANKLIN, H. T. 1838. Ex. 3 M. & W. 259.

A bill given to a participator, arising out of an unlicensed theatre, is an illegal consideration.

ACTION on a bill of exchange, given for an excess of advances made by the plaintiff to the defendant upon a partnership arising out of an unlicensed theatre.

The Court held, that an agreement between the plaintiff and defendant to share the profits of an unlicensed theatre being illegal, the plaintiff could not maintain any action on a bill given for an excess of advances made by him upon account of such partnership.

KIRK *v.* STRICKWOOD, H. T. 1833. K. B. 4 B. & Ad. 421; S. C. 1 N. & M. 275.

But a note given for the compromise of a misdemeanor, at the suggestion of the Court, is valid.

A PROMISSORY note was given by a defendant in prison, after conviction for a misdemeanor, and before sentence, in pursuance of a recommendation of the Court to compromise. In an action on that note, the case of *Beeley v. Wingfield*, (11 East, 46), was cited. There the defendant was indicted at the sessions for ill-treating his parish apprentices; and, being convicted, it was suggested to him

by the chairman of the Court, that, if he agreed to pay forty guineas towards the expenses of the prosecution, he should only be imprisoned six months instead of twelve. The defendant accordingly gave a promissory note for 42*l.*, and in the action which was brought for the non-payment of that note, it was held good.

Per Cur.—The present case falls within the principle of *Beeley v. Wingfield*. The note is *prima facie* a good note, and it lay upon the defendant to shew that the consideration was bad.

2. By Statute.

1st.—By Gaming.

SIGEL *v.* JEBB, 1820. N. P. 3 *Stark*. 1.

Abbott, C. J., in this case, decided, that a note given for a debt incurred at any game, whether of skill or of chance, is void under the 9 Ann. c. 14, s. 5.

All games, whether of skill or of chance, being within

9 Ann. c. 14, a note given under such circumstances is void.

SHILLITO *v.* THEED, E. T. 1831. C. P. 7 *Bing*. 405; S. C. 5 *M. & P.* 303.

ACTION by third indorsee against acceptor of a bill for 185*l.* The defence was, that the bill was void *ab initio* as a gambling transaction, it having been accepted by the defendant for the amount of a bet, which he had lost upon the race for the St. Leger stakes. It appeared that L., the drawer and payee, indorsed it to G., who indorsed it over to S., by whom it was indorsed to the plaintiff *bonâ fide* for full consideration, without notice of any defect in the quality of the instrument.

Hence, a bill given for a bet on a legal horse-race, if above 10*l.*, is void, even in the hands of a *bonâ fide* holder.

Per Cur.—Horse-racing generally is not legalized; the late statutes have only encouraged it *sub modo*. Betting at a horse-race can have no tendency to encourage the breed of horses, which was the sole object for permitting horse-races. The stat. 16 Car. 2, c. 7, expressly mentions horse-racing as a game; and it prohibits betting to an amount exceeding 100*l.* The 9 Ann. c. 14, s. 5, limits the betting to 10*l.* at one sitting, or to 20*l.* within twenty-four hours. It is clear, therefore, that the bill upon which this action is brought is illegal.

ALIKEN *v.* HOWELL, M. T. 1832. K. B. 1 *Nev. & M.* 191.

IN an action on a bill of exchange, after a verdict for the defendant, on the ground that the bill was drawn originally for a gambling debt, the affidavits negatived the defence, but did not state that the plaintiff had been taken by surprise.

Per Cur.—We cannot alter the law. The parties were not taken by surprise; if they had sufficient to shake the testimony given at the trial, the proof should have been then made available. There ought to be something very convincing for the Court, after this trial, to set aside the verdict.

The jury found for the defendant, where a bill was proved to be for gaming. The Court refused a new trial, the affidavits not shewing that the plaintiff was taken by surprise.

HITCHCOCK *v.* WAY, T. T. 1837. K. B. 2 *N. & P.* 72.

A BILL of exchange drawn for a wager on a horse-race, which was void by 9 Ann. c. 14, had been indorsed to a *bonâ fide* holder

The statute 5 & 6 Will. 4,

c. 41*, as to gaming and usury, does not apply to a case where the statute passed after issue joined, but before trial.

for value, who sued the drawer; and the cause was at issue before the 5 & 6 Will. 4, c. 41, was passed, but the trial took place after. On the question, whether the statute applied to this case—

Per Cur.—After the issue was joined, the 5 & 6 Will. 4, c. 41, was passed, which is both a repealing and an enacting statute. It begins by setting out in detail a variety of statutes, which it repeals, so far as they make any instruments void; and enacts, that such instruments shall be deemed to have been given on an illegal consideration. The plaintiff has argued that it is to have effect at the time of the trial; and many cases were cited in support of that doctrine, but they all turned upon the particular wording of the acts of parliament on which they were decided. And it is enough to say, that we find no such words in the present statute as will warrant us in giving the effect to it which the plaintiff requires. We are of opinion that the law in force when the action was commenced must prevail, unless the Legislature express a contrary intention.

2nd.—*By Smuggling.*

BILLARD v. HAYDEN, M. T. 1826. N. P. 2 C. & P. 473.

The indorsee of a bill given for prohibited goods cannot sue even the acceptor.

ACTION by indorsee against acceptor. It appeared that the bill had been indorsed to the plaintiffs for the price of a quantity of French silks, sold by them to Fiestale, the drawer of the bill. This sale being antecedent to the stat. 6 Geo. 4, c. 111, which allows the importation of French silks, it was contended that it was void under the stat. 50 Geo. 3, c. 55.

Per Abbott, C. J.—The statute, the 50 Geo. 3, c. 55, prohibits the importation of all foreign silks; and I have no hesitation in saying that, if these were foreign silks, and the bill was given in payment for them, the plaintiff cannot recover.

PELLECAT v. ANGELL, T. T. 1835. Ex. 2 C., R. & M. 311.

But a bill drawn by the plaintiff, a foreigner, for goods sold by him, to be

PLEA in assumpsit by drawer against acceptor of a bill, that it was given for goods sold by the plaintiff, a foreigner, to the defendant, for less than the real value, to be smuggled into this kingdom. On special demurrer—

* It is enacted, "That so much of the acts of the sixteenth year of the reign of his said late Majesty, King Charles the Second; the tenth year of his said late Majesty, King William the Third; the ninth, eleventh, and twelfth years of the reign of her said late Majesty, Queen Anne; the fifth year of the reign of his said late Majesty, King George the Second; the eleventh and twelfth, and the forty-fifth years of the reign of his said late Majesty, King George the Third; and the sixth year of the reign of his said late Majesty, King George the Fourth, —as enacts 'that any note, bill, or mortgage shall be absolutely void,' shall be and the same is hereby repealed; but, nevertheless, every note, bill, or mortgage, which, if this act had not been passed, would, by virtue of the said several lastly hereinbefore mentioned acts, or any of them, have been absolutely void, shall be deemed and taken to have been made, drawn, accepted, given, or executed for an illegal consideration; and the said several acts shall have the same force and effect, which they respectively should have had, if, instead of enacting that any such note, bill, or mortgage should be absolutely void, such acts had respectively provided that every such note, bill, or mortgage should be deemed and taken to have been made, drawn, accepted, given, or executed for an illegal consideration: provided always, that nothing herein contained shall prejudice or affect any note, bill, or mortgage, which would have been good and valid if this act had not been passed."

Per Cur.—We are clearly of opinion that this plea is bad. If a person enters into a contract for the purpose of contravening the laws of his own country, the policy of the law pronounces such contract to be null and void. It is equally clear, that, if a person enters into a contract violating the laws of a foreign country, such contract, inasmuch as the foreigner owes no allegiance to the revenue laws of the other country, is valid, except he himself performs some act of packing, &c.; in which case he must take the consequences of his own conduct, and submit to the confiscation of the goods like any other subject. The distinction is this:—if the plaintiff took any act or part in the transaction—if he packed the goods, or conducted himself as agent for violating the law of this country—he should take the consequences which such conduct entailed upon him. But it has not been yet said that a foreigner can be charged with violating the laws of this country, because he has sold goods to an Englishman who might do so.

smuggled into this country, is valid.

3rd.—*For Stock-Jobbing.*

DAY *v.* STUART, T. T. 1829. C. P. 6 *Bing.* 109; S. C. 3 *M. & P.* 334.—S. P. GREENLAND *v.* DYER, T. T. 1828. K. B. 2 *M. & Ry.* 422.

INDORSEE against drawer of a bill. Defence,—that the bill was accepted for the amount of differences in time-bargains. This was not clearly proved; or, at all events, it was not proved that the plaintiff was privy to these transactions. The jury having found for the plaintiff, the Court said, that, in *Edwards v. Dick*, (4 *Barn. & Ald.* 212), it was held to be no defence to an action on a bill of exchange, that it was accepted for a gaming debt, if it be indorsed over by the drawer, for a valuable consideration, to a third person; and refused to set the verdict aside.



A bill of exchange, given for differences in stock-jobbing, is not void as against the drawer in the hands of an indorsee without notice.

4th.—*By Usury.*

VALLANCE *v.* SEDDEL, M. T. 1838. Q. B. 6 *A. & E.* 932.

THE Court held, that the 58 Geo. 3, c. 93, only applies to protect bills given on usurious contracts, which come into the hands of bonâ fide holders upon discount, or where the consideration passes at the time of the transfer; and does not protect a holder, who receives them to secure an existing debt.

Bills given in payment of an antecedent debt, were not protected by the 58 Geo. 3, c. 93, as to usury*.

5th.—*Connected with Bankrupts and Insolvents.*

BIRCH *v.* JERVIS, T. T. 1828. N. P. 3 *C. & P.* 379.

Per Tenterden, C. J.—A BILL given to a creditor, to induce him to sign the certificate of a bankrupt, is void, in whosoever hands it may be, and whatever the consideration given by the holder; but if given merely to keep him from taking steps to oppose the bankrupt's obtaining it, it will be good in the hands of a holder for value without notice.

A bill, given to sign a certificate of a bankrupt is void, even in the hands of a bonâ fide holder.

* See post, div. XII., p. 280.

DAVIS *v.* HOLDING, H. T. 1836. Ex. 3 *M. & W.* 159; S. C. 1 *Tyrw. & Gr.* 371.

So, a bill accepted in favour of a petitioning creditor, in consideration of a fiat against the acceptor being abandoned, is void.

IN this case, the consideration for the bill of exchange was an agreement between a petitioning creditor, who had sued out a fiat of bankruptcy, and the bankrupt, that the former should cease to prosecute the fiat, in consideration of receiving a certain amount of his debt. On demurrer—

Per Cur.—As the agreement to abandon the fiat for a special benefit to the plaintiff was illegal, it avoids the bill of exchange between these parties, whether such agreement was part or the whole of the consideration for giving it. We are of opinion that the facts stated sufficiently shew the agreement to have been illegal.

ROSE *v.* MAIN, M. T. 1834. C. P. 1 *Bing. N. S.* 357; S. C. 1 *Scott*, 127.

And, under the 6 Geo. 4, c. 16, s. 8, a bill given to the petitioning creditor, after commission issued and before certificate, is void.

IN an action on a bill of exchange, by drawer against acceptor, it appeared that the plaintiff, being the petitioning creditor and assignee of the defendant, a bankrupt, took, in the interval between the suing out of the commission and the granting of the certificate, a bill of exchange payable at twelve months, by way of security for a portion of his debt, and proved for the residue under the commission.

Per Cur.—The 6 Geo. 4, c. 16, s. 8, enacts, “That, if any such trader, liable by virtue of this act to become bankrupt, shall, after a docket struck against him, pay to the person or persons who struck the same, or any of them, money, or give or deliver to any such person any satisfaction or security for his debt, or any part thereof, whereby such person may receive more in the pound in respect of his debts than the other creditors, such payment, gift, delivery, satisfaction, or security, shall be an act of bankruptcy, &c.; and every person so receiving such money, gift, &c., shall forfeit his whole debt, and also repay or deliver up such money, gift, &c., or the full value thereof, to such person or persons as the commissioners, &c., shall appoint.” It is, however, said, that the present case, where the security was given by the bankrupt in the interval between the issuing of the commission and the obtaining of the certificate, was not within the contemplation of the Legislature. But, in our opinion, when we take into consideration the grounds on which the Legislature framed the statute, the receiving of a security for a sum of money, within such interval of time, is a much stronger circumstance than if it was received before. We are, therefore, of opinion, it is within the contemplation of the Legislature, and within the precise mischief pointed at by the 8th section.

EVANS *v.* WILLIAMS, M. T. 1832. Ex. 1 *C. & M.* 30.

A debt discharged by the Insolvent Act is still merged, though insolvent joins his surety in a new note for the same debt, in an

IN an action by the payee against the maker of a note, it appeared that the defendant and his surety signed a promissory note. Defendant was afterwards discharged under the Insolvent Act. The payee applied to the surety for payment; whereupon, the defendant, to prevent the surety being sued, joined him in a new note. This action was brought on that note.

Per Cur.—By the Insolvent Act, the future effects of the insolvent

may be distributed amongst his creditors. At the period when the note was given, those future effects were liable. The Legislature, seeing the condition in which the act places the insolvent in this respect, make a provision, which puts it out of his power to subject himself to the old debt, and makes him not liable upon a new contract for the old debt. Now, is not this a new contract for the old debt? It is said, that the old debt was discharged; but the surety remained liable to the old debt, and the security is given for the old debt; for, if the property or future effects of the insolvent should yield 20*s.* in the pound, that would go in exoneration of the note; and it is clear, that the payee of the note could not be entitled to satisfaction from both. That shews clearly that the note was given for the old debt.

action at least
against the in-
solvent.

VIII. RELATIVE TO THE ALTERATION OF A BILL OR NOTE.

(a) WITH REFERENCE TO THE TIME WHEN MADE.

LEYKARIFF *v.* ASHFORD, H. T. 1827. C. P. 12 *Moore*, 281.

THIS was an action of assumpsit on a bill of exchange, dated the 20th April, 1826, drawn by one Cornica upon, and accepted by, the defendant, payable at three months after date, and indorsed by Cornica to the plaintiff. The defendant called a witness, who proved that the bill was originally dated on the 28th January, and afterwards altered to the 20th April; but, on the production of the bill, it appeared, that, although the original date had been altered as stated, the defendant had written on it,—“Due May 23rd.” But as the witness said that the bill, in its altered state, was presented to him by *the drawer* for the purpose of being discounted, his Lordship left it to the jury to say, whether the alteration had been made before the bill had been negotiated, and with the defendant’s assent. They found in the affirmative; and accordingly gave a verdict for the plaintiff.

An alteration,
by consent, be-
fore negotia-
tion, does not
vitiate,

Per Cur.—We entertain no doubt whatever in this case, as, looking at the bill, it appears that it could not have been dated in January. The word “April” is written on an erasure, and there is no letter in January which would be carried above the line except *J*; and here the final letter of the original date appears to have been an *h*. It is, therefore, most probable, that the bill was drawn in March, and afterwards altered to April. The defendant (the acceptor) shewed at what time the bill would become due; and, probably, he did so to prevent any difficulty that might arise as to the erasure. It appears that the bill was not negotiated by the drawer previously to the alteration, as he himself presented it to the witness to be discounted; and the proper stamp was upon it when it was drawn. The merits are clearly with the plaintiff: and, for anything that appears to the contrary, the erasure might have been made at the time the bill was drawn; or, at all events, it now appears to be a perfect bill, the defendant himself having certified on the face of it the day it would become due.

SHERRINGTON *v.* JERMYN, T. T. 1828. N. P. 3 C. & P. 374.

though made
after it was
signed*.

A NOTE, after being signed, but before being given to the payee, and with consent of all the parties, was altered by erasing the words "on demand," and inserting "one month after date," and striking out the words "with interest."

Lord *Tenterden*, C. J., held, that the alteration did not vitiate, as it was to be considered as all one transaction, and not issued at the time of the alteration.

(b) WITH REFERENCE TO THE NATURE OF THE ALTERATION.

1. *As to the Time.*

BRUTT *v.* PICARD, H. T. 1824. N. P. 1 R. & M. 37.

The alteration
of a bill, origi-
nating from a
mistake, as 1822
to 1823†,

THE drawer and acceptor of a bill gave it to their agent to pay away, and he perceiving that it had been dated, by mistake, 1822, instead of 1823, made the necessary alteration without the authority of his principals.

Abbott, J., held, that, if the jury thought it was originally dated by mistake, the alteration did not vitiate the bill.

KNIGHT *v.* CLEMENT, E. T. 1838. Q. B. 3 N. & P. 375; S. C. 8 Ad. & E. 215.

or three
months into
two months, to
agree with the
stamp, does not
vitate, if *bonâ*
fidē.

THE plaintiff produced the bill in question, which was drawn upon a stamp sufficient for a two months' bill only. It appeared, however, that it had been originally written "three months after date;" over the word "three" was written "two," and the former word was blotted, and the word "two" was written under it. No explanation was given by the plaintiff as to when or under what circumstances the alteration was made.

Lord *Denman*, C. J., left it to the jury to say, upon the inspection of the note itself, whether they would adopt the plaintiff's suggestion, that the word "three" had been written and then blotted out, and the word "two" written over it, before the instrument was complete. If they thought that it had been altered before it was complete, the plaintiff was entitled to recover; but it was incumbent upon him to prove that fact, and, if he failed in establishing it, the defendant was entitled to the verdict. He reserved leave to the defendants to move to enter a nonsuit, if it was necessary for the plaintiff to give evidence to explain the alteration of the bill, independent of the bill itself.

Per Cur.—The plaintiff produced the bill, which had the word "two" before "months," but the letters of that word were written over those of the word "three," and the strokes comprising the letters of the latter word appeared to have been blotted. The stamp was good for a two months' bill, but bad for one of three months.

* In an action by indorsee against acceptor, it appeared, that, after the acceptance, an addition had been written in another handwriting, making it payable at a banker's:—Held, that such alteration was material, and threw the onus on the plaintiff of shewing that it was made with the consent of the party accepting. (*Desbrowe v. Witherby*, 6 C. & P. 758; S. C. 4 M. & Rob. 438. See *Cowie v. Halsall*, 4 B. & Ad. 197).

† An alteration in the date according to the original intention of the parties, and to correct a mistake, does not vitiate. (*Jacob v. Hart*, 6 M. & S. 142).

The defendant's counsel objected, that the party producing a document is bound to explain such an ambiguity appearing on the face of it, and to shew distinctly that the alteration was made before the bill was negotiated, and done bona fide. And we are of the same opinion.

Rule absolute for a new trial.

2. *As to Place of Payment.*

MACINTOSH *v.* HAYDEN, H. T. 1826. N. P. 1 *Ry. & M.* 362.—
S. P. SIBLEY *v.* FISHER, T. T. 1838. Q. B. 2 *N. & P.* 430.

AFTER the bill became due, the drawer applied to the plaintiff to advance money upon it, which the latter objected to do, the bill not being accepted payable at a banker's; upon which the party wrote under the defendant's acceptance,—“Payable at Messrs. R. & Co., bankers, London.”

Abbott, C. J., held, that it was an alteration in a material part, and discharged the acceptor.

A drawer, by adding to the acceptance the name of a “banker,” discharges the acceptor,

STEVENS *v.* LLOYD, H. T. 1829. N. P. 1 *M. & Malk.* 292.—S. P.
DESBROWE *v.* WITHERBY, M. T. 1834. N. P. *M. & Rob.*
438; S. C. 6 *C. & P.* 758.

A BILL of exchange, drawn by A., payable to his own order, and accepted by B. generally, was altered, with the consent of B., while it continued in the hands of A., by the addition of a particular place of payment to the acceptance.

unless the acceptor consents.

Lord Tenterden, C. J.—The drawer's liability might be altered, but not the acceptor's; who, even on the altered acceptance, is liable without the presentment at the particular place. I think the alteration being made in this case with the defendant's consent, does not furnish any answer to the action.

WALTER *v.* CUBLEY, M. T. 1833. Ex. 2 *C. & M.* 151; S. C.
4 *Tyr.* 87.

THE bills were originally accepted by the defendant, payable at his residence in Chelsea. A month or six weeks after they were delivered to the plaintiff, the plaintiff's clerk called on the defendant, and requested him to alter the acceptance, by making the bills payable at a banker's. The plaintiff said he had no banker, but he altered the acceptance by making the bills “payable at J. Bland's, Great Surrey-street, Blackfriars.” It was contended, that the alteration of the acceptance rendered a new stamp necessary, as it was a material alteration.

As the making a bill, six weeks after it is drawn and accepted, payable at a banker's by the acceptor himself, is not an alteration that will vitiate.

Sed per Cur.—The alteration here is made by the acceptor; and it does not vary the contract, but merely indicates where the holder is to apply for payment. All that is done is, in effect, the same as if the acceptor had changed his residence. For the purpose of this bill, he says, my residence is at Mr. Bland's.

3. *As to the Party to whom addressed*.*

* If a bill is addressed to “A. and B.” by the name of “A., B., & Co.,” and they accept it by the name of A. and B., and the address of the bill is afterwards altered to “A., B., & Co.” this is an immaterial alteration, and does not discharge the acceptor. (*Farquhar v. Southey*, M. T. 1826, N. P., M. & M. 14).

4. *As to the Words, "or Order."*BYROM *v.* THOMPSON, M. T. 1839. Q. B. 3 P. & D. 71.

The insertion of the words, "or order," if consistent with the original intention of the parties, is not a material alteration.

ASSUMPSIT. The first count of the declaration was on a promissory note for 525*l.* Plea, amongst others, that the defendant did not make the note, modo et formâ. It appeared that the words, "or order," were omitted in the original note; that it was sent back some months after to the defendant to have them inscribed, which the defendant did, saying, that "the note was useless, unless those words were put in." Verdict for the plaintiff, with leave to the defendant to move to set it aside so far as regarded that count.

Per Cur.—The only question is, whether the alteration was made in pursuance of the original intention. If so, the note is not vitiated. *Knight v. Clement*, (ante, p. 264), goes only to shew, that the onus of proving the time of alteration lies on the party seeking to enforce a bill, and that the jury are not at liberty to form conjectures respecting it. Here, the defendant admits that it was his omission; that shews that it was originally a mistake. Then the case falls within *Kershaw v. Cox*, (3 Esp. N. P. C. 246).

ATTWOOD *v.* GRIFFIN, T. T. 1826. N. P. 1 Ry. & M. 425.

As where a party accepted a bill in blank on a bonâ fide transfer, the words, "or order," were introduced:—Held, no vitiating alteration.

A PARTY accepted a bill in blank, which was bonâ fide negotiated to a party, who inserted the words, "or order," after his own name, and then indorsed it.

Best, C. J., held, that a party so accepting undertakes to be answerable for it in the shape of a bill, which a bonâ fide holder has a right to give it; and that such insertion was not an alteration vitiating the bill, nor requiring a new stamp.

5. *As to the Words "joint and several."*PERRING *v.* HONE, E. T. 1827. C. P. 4 Bing. 28; S. C. 12 Moore, 135; S. C. 2 C. & P. 401.

Inserting the words, "jointly and severally," vitiates a note.

A PARTY to a joint and several note, when it became due, paid part, and signed a *joint* note for the residue, which was afterwards without his knowledge interlined by the words *jointly* and *severally*.

The Court held, that as to him it was void by the alteration; and his answer to a letter calling upon him for payment of his joint and several note, that it should receive his earliest attention, did not amount to a subsequent assent to the alteration.

CATTIN *v.* SIMPSON, T. T. 1838. Q. B. 3 N. & P. 248.

But not the addition of another party's name.

A. AND B. having made their joint and several promissory note to secure the debt of A., C. afterwards added his name to it.

The Court held, that the addition of C.'s name was not such an alteration in the note as rendered it void against A. and B.; and therefore, that B. was entitled to recover from A. the amount which he had paid on account of it.

(c) PROOF AND EXPLANATION OF.

HENMAN *v.* DICKINSON, M. T. 1828. C. P. 5 *Bing.* 183*; S. C. 2 *M. & P.* 289.

INDORSEE against acceptor of a bill. The wife of the drawer was called as a witness to prove that the bill had been altered by her husband, after it had been accepted, and before he had indorsed it over to the plaintiff. The alteration was in the date and also in the amount.

The plaintiff must explain the alteration.

Best, C. J., was of opinion, that, as it appeared on the face of the bill that an alteration had been made upon it, it was incumbent on the plaintiff to shew under what circumstances that alteration had been made, before he could be allowed to recover upon it.

And of *that* opinion were the *Court*.

BISHOP *v.* CHAMBRE, M. T. 1827. N. P. 1 *M. & M.* 116; S. C. 3 *C. & P.* 55.—S. P. DESBOROW *v.* WETHERBY, 1834. N. P. 6 *C. & P.* 758; S. C. *M. & Rob.* 438.

Per Lord Tenterden.—WHERE a note happens to have been altered or erased in any part, it lies on the plaintiff to account for the suspicious form of it; and the jury may judge from inspection, whether the alteration was made after the note was made and delivered.

As an erasure†.

KNIGHT *v.* CLEMENTS, E. T. 1838. Q. B. 3 *N. & P.* 375; S. C. 8 *Ad. & E.* 215.

THE plaintiff produced the bill, which had the word “two” before “months,” but the letters of that word were written over those of the word “three,” and the strokes comprising the letters of the latter word appeared to have been blotted. The stamp was good for a two months’ bill, but bad for one at three months. The defendant’s counsel objected, that the party producing a document is bound to explain such an ambiguity appearing on the face of it, and to shew distinctly that the alteration was made before the bill was negotiated.

If no explanation be given, it ought to be left to the jury, whether the bill has been altered or not?

Per Cur.—We think the rule for a nonsuit must be made absolute. The plaintiff was bound to prove a bill accepted payable at two months. That which he produced was accepted payable either at *two* or *three* months, with no evidence whether it was the one or the other. The mode of obliteration might have furnished arguments in favour of one or the other supposition, and material confirmation adduced as to that fact; but, standing by itself, it was obviously no better than a conjecture, for the alteration might have been too late, and accompanied with a fresh marking by wet ink, rubbed over on the instant. The case of *Bishop v. Chambre*, *supra*, was cited for the plaintiff, and the marginal note appears favourable to him; but Lord *Tenterden’s* proceeding on that occasion was,

* Questioning the case of *Rex v. Cliviger*, (2 T. R. 263).

† When a bill, on inspection, appeared to have been on the face of it altered as to the time, and a place inserted in the acceptance, and no evidence offered on either side explanatory of the alterations:—Held, that it was for the jury to say, whether it had been altered after the acceptance, and, if so, that the indorsee could not recover. (*Taylor v. Moseley*, 6 C. & P. 273).

in truth, the other way. He permitted the jury to inspect the bill, to see if there had been any alteration, which there manifestly had; and then decided against the party producing it, for want of proof that it was made before the instrument was complete.

Rule absolute.

(*d*) EFFECT OF, AS REGARDS ORIGINAL RIGHTS.

ALDERSON *v.* LANGDALE, T. T. 1832. K. B. 3 *B. & Ad.* 660.

An alteration by the indorser extinguishes the original debt.

A BILL was given by the drawer, in payment of goods, to the indorser, who materially altered the bill.

The Court held, that it operated as a satisfaction of the debt, and that he could not resort to the original consideration for which it was given.

SLOMAN *v.* COX, M. T. 1834. Ex. 1 *C., M. & R.* 471; S. C. 5 *Tytw.* 174.

But not when made by the drawer, as where a bill is dishonoured and another given, which becomes void by reason of a material alteration, the right to sue on the first bill revives.

A BILL for 18*l.* having been dishonoured, it was agreed that the holder should receive 8*l.* in cash, and another 10*l.* bill in satisfaction. The drawer accordingly drew another bill, which was accepted by the same acceptor, who, after acceptance, without the consent or knowledge of the former, and without fraud, altered it. The plaintiff having recovered the original bill, brought this action upon both bills.

Per Cur.—The defendant is liable on the 18*l.* Has he paid it? It is incumbent on him to shew that he has. It turns out, in fact, that he gives no bill; the defendant has sent only a piece of paper, and the plaintiff is remitted to his right on the original bill.

SUTTON *v.* TOOMER, M. T. 1827. K. B. 7 *B. & C.* 416; S. C. 1 *M. & R.* 125.—S. P. ATKINSON *v.* HANDEN, T. T. 1836. K. B. 2 *A. & E.* 658.

Although a note be vitiated by an alteration, the Court may look at it for collateral purposes.

A PARTY deposited money with a banker, and received a note properly stamped, promising to pay the sum deposited, “with interest at the rate of 3 per cent. per annum, to the day of acceptance;” and it was proved that the money was, in fact, deposited upon the terms specified in the note, and that interest at 3 per cent. had for some time been paid; but that a subsequent alteration, at the request of the banker, was made in the note, by striking out the word “three,” and writing over it “two and a half.”

The Court held, that although, by the alteration of the note, it became invalid as a security, yet that the original contract was not thereby extinguished; and that it was competent to the Court to look at the instrument for the collateral purpose of ascertaining the terms on which the deposit was made.

GASCOYNE *v.* SMITH, E. T. 1825. Ex. 1 *M'Clel. & Y.* 338.

An erasure of a name does not furnish a notice of vice in its

IN an action by an indorsee of a note payable on demand, but with interest until paid—

The Court held, (dub. *Hullock*, B.), that the circumstances of the erasure of a name, and a considerable arrear of interest, were

not sufficient to found a notice of vice in the original creation of the note, and to put the indorsee in the same situation as the payee, as against the maker.

creation, as against an indorsee.

(e) OBJECTION, HOW RAISED. See post, Div. XXI., *Remedy by Action—Pleas.*

IX. RELATIVE TO THE ACCEPTANCE OR NON-ACCEPTANCE OF A BILL.

(a) WITH REFERENCE TO THE MEANING OF THE WORD.

SUTTON *v.* TOOMER, M. T. 1827. K. B. 7 B. & C. 416; S. C. 1 M. & R. 125.

UPON making a deposit at a bank, a deposit-note was given, expressed to be payable at ten days' sight, with 3 per cent. interest until the day of acceptance.

The Court held, that the term "acceptance" must be taken to mean "demand," and no acceptance was necessary.

The word "acceptance" on a banker's deposit-note means "demand."

(b) WITH REFERENCE TO THE PRESENTMENT FOR.

PHILPOTT *v.* BRYANT, M. T. 1827. N. P. 3 C. & P. 244.

Per Park, J.—WHERE bills are made payable after *date*, it is not necessary that they should be presented for acceptance as well as payment; *secus*, if payable after *sight*. And it is sufficient that the bill is presented at the place where it is made payable, notwithstanding the drawee may die before it becomes due, and his representatives may be ignorant of such bill existing.

See 2 H. Bla. 569; 7 Taunt. 397.

Bills payable after date need not be presented for acceptance; *aliter*, when payable at sight,

SHUTE *v.* ROBINS, M. T. 1827. N. P. M. & M. 133.—S. P. MELLISH *v.* RAWDON, T. T. 1827. C. P. 9 Bing. 416; S. C. 2 M. & Scott, 570.

A BILL, drawn by bankers in the country on their correspondents in London, payable after sight, is indorsed to the traveller of the plaintiffs on their account; he transmits it to them after an interval of a week, and they, two days afterwards, sent it for acceptance, which is refused, the drawer having become bankrupt. If the bill had been sent by the traveller to his employers as soon as he received it, they would have been able to get it accepted before the bankruptcy; but, sending it when he did, they could not do so.

Lord Tenterden, C. J., held, that there was no laches on the part of the plaintiffs or their servant, so as to deprive them of their remedy against the indorsers.

or a certain period after sight.

MELLISH *v.* RAWDON, T. T. 1827. C. P. 9 Bing. 416; S. C. 1 M. & Scott, 570.

THE plaintiff had purchased in the market a bill, payable at sixty days' sight, on a foreign house, and the exchange falling, he had kept it nearly five months, when he sold it again. The drawer

Whether there has been unreasonable delay

in forwarding a bill, payable at sight, for acceptance, is a question for the jury.

having failed before the bill reached him, and the plaintiff obliged to pay the amount to his indorsee, in an action by him against the drawer—

The Court held, that the Judge properly directed the jury to say whether, under all the circumstances, and looking to the interests of both drawer and holder, there had been unreasonable delay in forwarding the bill for acceptance; and they having found in favour of the plaintiff, the Court refused a new trial.

(c) WITH REFERENCE TO THE LIABILITY OF THE DRAWEE WITHOUT ACCEPTANCE.

MARZETTI v. WILLIAMS, E. T. 1830. K. B. 1 B. & Ad. 415.

In general, the drawee is not liable before acceptance; but a banker who has effects in his hands is an exception.

M. KEPT his account with Williams & Co., bankers. One day, in the morning, the balance in their hands due to M. was 69*l.* 16*s.* 6*d.* About one o'clock, a 40*l.* Bank of England note was paid in to M.'s account; a little after three o'clock, a cheque, drawn by M., for 87*l.* 7*s.* 6*d.* was presented. The clerk, after having referred to a book, said there was not sufficient assets, but that the cheque might, probably, go through the clearing-house. On the following day the cheque was paid. M. brought a special action on the case against the bankers. No actual damage was proved; but the jury found a verdict for the plaintiff, with nominal damages. On a rule for a new trial—

"I cannot forbear to observe," says Lord *Tenterden*, "that it is a discredit to a person, and therefore injurious, in fact, to have a draft refused payment for so small a sum. It is not like the drawee of a bill of exchange, who is not liable before acceptance. It is an act particularly calculated to be injurious to a person in trade. My judgment in this case, however, proceeds on the ground that the action is founded on a contract between the plaintiff and the bankers—that the bankers, whenever they should have money in their hands belonging to the plaintiff, or within a reasonable time after they should have received such money, would pay his cheques; and there having been a breach of such contract, the plaintiff is entitled to recover damages."

(d) WITH REFERENCE TO THE PERSON BY WHOM THE ACCEPTANCE IS TO BE MADE. See ante, Div. VI., p. 243.

(e) WITH REFERENCE TO THE TIME WHEN MADE.

MOLLOY v. DELVES, H. T. 1831. N. P. 4 C. & P. 492; S. C. 7 Bing. 428.

A bill may be accepted before it was drawn*.

ACTION by the indorsee against the acceptor. It appeared that the bill had been accepted by the defendant before the drawer had signed his name to it.

Per Tindal, C. J.—It seems, that the acceptor has accepted the bill in blank; and the question is, whether he does not afterwards adopt it. I think the plaintiff is entitled to a verdict.

* Or after it was due. (*Christie v. Peart*, H. T. 1841, Ex., 7 M. & W. 491).

(f) WITH REFERENCE TO THE MODE IN WHICH IT IS TO BE DONE.

DUFAMUR *v.* OXENDEN, T. T. 1831. N. P. M. & Rob. 90.

THE bill was drawn by Dufaur, payable to his own order, and addressed to the defendant, who wrote across it, "Accepted, payable at Messrs. Stevens & Co.'s," without any signature. It was, for the defendant, objected, that this was no acceptance, for want of a signature.

Patteson, J., in summing up to the jury, said, that he was of opinion, that the writing might be valid in law as an acceptance, notwithstanding the want of signature; but that it was a question for the jury, whether it was intended to operate as an acceptance in its present state.

An acceptance, "accepted payable at A. B.'s," unsigned, is good if the jury think it was intended to operate as such *.

(g) WITH REFERENCE TO SPECIAL ACCEPTANCES.

TURNER *v.* HAYDEN, E. T. 1825. K. B. 4 B. & C. 1; S. C. 1 R. & M. 215.—S. P. HIGGINS *v.* NICHOLS, H. T. 1839. B. C. 7 D. P. C. 551.

By the 1 & 2 Geo. 4, c. 78, a bill, payable at a banker's, but not payable "there only," is a general acceptance. In this case, the bill was payable at a banker's, but not "there only." The acceptor had effects in his banker's hands at the time when the bill became due, and for three weeks afterwards, when the banker failed.

The Court held, that the acceptance amounted in law to a general acceptance; and the holder being under no obligation to present it there, the acceptor was not discharged, the bankers having failed in the mean time.

To constitute a special acceptance at a banker's, the words "there only" must be introduced †.

* By 1 & 2 Geo. 4, c. 78, s. 2, it is enacted, "That, from and after the 1st day of August, no acceptance of any inland bill of exchange shall be sufficient to charge any person, unless such acceptance be in writing on such bill, or, if there be more than one part of such bill, on one of the said parts."

† By 1 & 2 Geo. 4, c. 78,—“Whereas, according to law as hath been adjudged, where a bill is accepted payable at a banker's, the acceptance thereof is not a general but a qualified acceptance; and whereas a practice hath very gradually prevailed among merchants and traders so to accept bills, and the same have among such persons been very generally considered as bills generally accepted, and accepted without qualification; and whereas many persons have been and may be much prejudiced by such practice and understanding, and persons accepting bills may relieve themselves from all inconvenience by giving such notice as hereinafter mentioned of their intention to make only a qualified acceptance thereof; be it therefore enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that, from and after the first day of August now next ensuing, if any person shall accept a bill of exchange, payable at the house of a banker, or other place, without further expression in his acceptance, such acceptance shall be deemed and taken to be, to all intents and purposes, a general acceptance of such bill; but if the acceptor shall, in his acceptance, express, that he accepts the bill, payable at the banker's house or other place only, and not otherwise or elsewhere, such acceptance shall be deemed and taken to be, to all intents and purposes, a qualified acceptance of such bill, and the acceptor shall not be liable to pay the said bill, except in default of payment, when such payment shall have been first duly demanded at such banker's house or other place.”

SELBY *v.* EDEN, T. T. 1826. C. P. 3 *Bing.* 611; S. C. 11 *Moore*, 511.—S. P. FAYLE *v.* BIRD, E. T. 1827. K. B. 6 *B. & C.* 531.

The 1 & 2 Geo. 4, c. 78, cannot be varied by the language of the drawer, or that of the acceptor, in framing a bill; hence, making it payable "at L." in the body, is still a general acceptance.

IN an action by the indorsee against the acceptor of a bill of exchange, payable to the order of the drawer in London, the declaration stated, that the defendant accepted it at London, whereby he became liable to pay. It was contended, that, as the bill was drawn payable to the drawer's order in London, a presentment there ought to have been averred in the declaration and proved. The late statute 1 & 2 Geo. 4, c. 78, only relates to the regulation of acceptances payable at particular places, and does not at all operate on the place of payment mentioned by the drawer in the body of the bill; and, consequently, there ought to have been an averment of a presentment to the acceptor in London.

Sed per Cur.—It must be taken to be a general acceptance, and no averment or proof of presentment at London is necessary; and, under 1 & 2 Geo. 4, c. 78, no distinction can be drawn, whether the bill is rendered payable at a banker's or other place by the language of the drawer or that of the acceptor.

MAHONEY *v.* ASHLIN, T. T. 1831. K. B. 2 *B. & Ad.* 478.

The 1 & 2 Geo. 4 only applies to bills accepted in England, and the 9 Geo. 4 only to bills accepted in Ireland.

ASSUMPSIT against the defendants as the acceptors of a bill; the acceptance was not written *on the bill*. The bill was drawn at Limerick, in Ireland, upon the defendants, living in England, and accepted by them, supposing a written acceptance not to be necessary according to the 1 & 2 Geo. 4, c. 78, s. 2, which requires an acceptance of an "inland" bill to be in writing on the bill.

Per Cur.—It appears to us, that this is not an inland bill within the meaning of the statute 1 & 2 Geo. 4, c. 78, s. 2. The statute 9 & 10 Will. 3, c. 17, distinctly explains what is an inland bill—a bill "drawn in or dated at any trading city or town, or any other place in the kingdom of England, dominion of Wales, or town of Berwick-on-Tweed." Now, before the union with Scotland, it could not have been considered an inland bill; nor could it have been so after the union with Scotland, and before the union with Ireland. Then, has the act of union with Ireland altered this description of an inland bill? We see no reason to believe that it has; consequently, the 1 & 2 Geo. 4, c. 78, s. 2, only applies to inland bills, drawn and accepted in England; as does also the 9 Geo 4, c. 24, s. 8, to Irish bills.

LESLIE *v.* HASTINGS, T. T. 1831. N. P. 2 *M. & Rob.* 119.

An acceptance in blank, with an authority to be filled up in a particular mode, is not within the 1 & 2 Geo. 4, c. 78.

IN an action on a bill of exchange, it appears that the defendant accepted a bill in blank, with an express authority to fill up the bill in a particular mode, which authority had been pursued.

Lord *Lyndhurst*, C. B., was of opinion, that it was good, and was not affected by the 1 & 2 Geo. 4, c. 78, s. 2, which was intended only to get rid of promises to accept.

(h) WITH REFERENCE TO BLANK ACCEPTANCES.

SCHULTZ *v.* ASTLEY, H. T. 1836. C. P. 2 *Bing. N. S.* 544; S. C. 2 *Scott*, 815; S. C. 7 C. & P. 99.

IN an action against the defendant as acceptor of several bills of exchange, it appeared that the defendant gave his acceptance in blank to M. H. Two of them afterwards, before they were filled up, and whilst they had no writing upon them, except the defendant's name, were signed and indorsed by a stranger to the defendant; another was filled up by a person named Thomas Wilson Richardson, as drawer and indorser, who, upon this occasion, signed as Thomas Wilson.

The validity of a bill is not affected by its being accepted and indorsed in blank, and afterwards filled up by a stranger.

The Court held, that such modes of drawing and indorsing did not invalidate the bills, and the defendant, by giving his acceptances, sanctioned the former; and, in the latter, the signature of the party, as Thomas Wilson, was not *primâ facie* a forgery.

(i) WITH RESPECT TO THE ACCEPTOR'S LIABILITY FOR GIVING UP BILL TO WRONG PARTY.

MORRISON *v.* BUCHANAN, T. T. 1833. N. P. 6 C. & P. 18.

IN trover for a bill of exchange, it appeared, from the testimony of a witness, that, by the usage and regular course of business, bills left for acceptance were given out to persons who mentioned the amount, number, and mark; and the jury found, that the outdoor clerk of the plaintiff, the party leaving the bill, had by his conduct enabled a person to ascertain the private mark, and that the defendants had used all due and ordinary caution. In fact, a person not entitled to the bill had fetched it away.

Any person who mentions the amount, describes the bill and private mark, is entitled to a bill left for acceptance; hence, the acceptor is not liable if given to a wrong party.

Littledale, J., said the action could not be maintained.

(j) WAIVER OF ACCEPTANCE.

SWEETING *v.* HALSE, E. T. 1829. K. B. 9 B. & C. 365.

A PLAINTIFF sued upon a bill of exchange given to him, and it appeared, on the trial, that, by agreement between the parties, the bill had been cancelled, and another bill given, which had not been declared upon, and a verdict thereupon passed for the defendant.

A cancellation of the acceptance is a waiver by the holder.

The Court refused afterwards to allow the plaintiff to amend, upon payment of the costs of the trial, by adding counts upon the new bill.

X. RELATIVE TO THE ACCEPTANCE OF A BILL SUPRA PROTEST*.

WILLIAMS *v.* GERMAINE, M. T. 1827. K. B. 7 B. & C. 468; S. C. 1 M. & Ry. 394, 403.

ON a bill drawn payable after sight, acceptance of which was refused, but the drawer's address not being known, notice could not

Where B. accepts a bill for

* This description of acceptance is frequently made upon a foreign bill, for the purpose either of promoting the negotiation of the instrument, when the

the honour of the drawer, on the refusal of A. the drawee, it must be presented to the drawer for payment before B. can be charged on his acceptance.

be given, and shortly after it was accepted by his father for the honour of the drawer, and, on the bill becoming due, was presented to the original drawees, according to the acceptance for honour, and to the acceptors for honour, but refused payment by both.

The Court held, in an action against the drawers, that such presentments were sufficient; but that the declaration against the acceptor for honour was insufficient, for want of averring a presentment to the original drawer. An acceptance for honour is to be considered not absolutely such, but in the nature of a conditional acceptance, and he is therefore liable only on the same proof as would entitle him to recover against the party for whose honour he has accepted.

VANDEWALL *v.* TYRRELL, T. T. 1827. N. P. 1 M. & M. 87.—
S. P. MITCHELL *v.* BARING, M. T. 1829. K. B. 10 B. & C. 4.

To enable a plaintiff paying bills for the honour of the drawer to recover for money paid to his use, a formal protest should be made before payment †.

THE defendant, a resident in Jamaica, drew several bills on a party in London. The bills were duly accepted, but were dishonoured, and noted for non-payment at the time they became due, which was on the 30th of January, 1825. The plaintiffs, on the request of the acceptors, paid the bills for the honour of the drawer on the 8th of August, 1825, and gave notice to the defendant the first foreign post. In May, 1826, the notary public was instructed to protest the bill for non-payment, which he did. The protest purported to have been made before the payment, and in form asserted,

drawee's credit is suspected, or to save the reputation and prevent the prosecution of some of the parties, where the drawee either cannot be found, or is not capable of making a contract, or refuses to accept; and such acceptance is called an acceptance for the honour of the person on whose behalf it is made, and it enures to the benefit of all who are parties subsequently to that person. (1 Ld. Raym. 83; Beawes, pl. 34; 1 Lutw. 899). This security is usually given by making another subscription under the protest, that the person who becomes new security will be bound as principal for the payment of the sum mentioned in the bill upon which the protest is made. (Marius, 28). Any person may, without the consent of the drawer or indorser, accept the bill *supra protest*. (5 Ves. 573). The drawee, though he may not choose to accept on account of him in whose favour he is advised the bill is drawn, may nevertheless accept for the account and honour of the drawer; or in case he do not choose to accept on account of the drawer, he may accept for the honour of the indorser; in which latter case he should immediately send the protest on which he made the acceptance to the indorser. (Beawes, 23). It is said, that, if the holder be dissatisfied with the acceptance *supra protest*, and insist on a simple acceptance, and protest the bill for want of it, the acceptor should renounce the acceptance made by him, and should insist on its being cancelled. (Beawes, pl. 37). The method of accepting *supra protest* is this: the acceptor must personally appear with witnesses before a notary, (whether the same who protested the bill or not, is of no importance), and declare that he accepts such protested bill in honour of the drawer and indorser, &c., &c.; that he will satisfy the same at the appointed time; and then he must subscribe the bill thus "accepted, *supra protest*, in honour of J. B., &c." (Beawes, 458). But this acceptance *supra protest* may be so worded, that, though it be intended for the honour of the drawer, yet it may equally bind the indorser; and, in such a case, it must be sent to the latter. (Beawes, 457; Marius, 88).

† A person accepting a bill *supra protest*, either for the honour of a drawer or of an indorser, although without his order or knowledge, has his remedy against such person, who must indemnify him from any damage he may have sustained, the same as if he had acted entirely by his direction. (Beawes, pl. 47; 1 T. R. 269). He who accepts a bill in honour of the drawer only, has no remedy against any of the indorsers, because he accepts merely on the behalf of the drawee; but, the acceptor for the honour of the drawer of a bill already accepted by the drawee, but protested by the holder for better security, may, when he has paid the bill,

that the "plaintiffs were ready to pay for the honour of the drawer." He stated the custom to be, to protest formally before the payment.

Lord *Tenterden*, C. J.—The plaintiffs must be nonsuited: they sue upon the custom of merchants; that custom clearly is, that a formal protest should be made before payment is made for the honour of any party to the bill.

By 6 & 7 Will. 4, c. 58, "Whereas, bills of exchange are occasionally accepted *supra potest* for honour, or have a reference thereon in case of need: and whereas, doubts have arisen when bills have been protested for want of payment as to the day on which it is requisite that they should be presented for payment to the acceptors or acceptor for honour, or the referees or referee, and it is expedient that such doubts should be removed; be it therefore enacted, that it shall not be necessary to present such bills of exchange to such acceptors or acceptor for honour, or to such referees or referee, until the day following the day on which such bills of exchange shall become due; and that if the place of address on such bill of exchange of such acceptors or acceptor for honour, or of such referees or referee, shall be in any city, town, or place, other than in the city, town, or place, where such bill shall be therein made payable, then it shall not be necessary to forward such bill of exchange for presentment for payment to such acceptors or acceptor for honour, or referees or referee, until the day following the day on which such bill of exchange shall become due."

By 6 & 7 Will. 4, bills accepted for honour may be presented the day after they become due.

XI. RELATIVE TO THE TRANSFER OF A BILL OR NOTE.

(a) WITH REFERENCE TO THE FORM OF.

SIGOURNEY v. LLOYD, M. T. 1828. K. B. 8 B. & C. 622; affirmed on Error, 5 Bing. 525; S. C. 3 M. & P. 229; S. C. 3 Y. & J. 220.

A BILL of exchange was thus indorsed: "Pay to S. W., or order, for my use." The bankers of S. W. discounted this bill for him. The proceeds by him were misappropriated. In assumpsit for money had and received—

Per Cur.—The question is, whether the words "for my use," have or have not any effect with reference to the bill itself. The person who remits may give private directions in his letter indorsing the bill to his agent; and if he means to give nothing more than a private direction, he must confine himself to the letter only. But, the introduction of the words, "to my use," upon the face of the bill itself, is for the purpose of apprizing the world in general that he has not given to the indorsee a general and unlimited authority to possess that bill and apply it to his own purposes, but that he is

Where a bill, payable to order was indorsed generally by the payee to A., and by him "pay to B., or his order, for my use:"—Held, a restrictive indorsement.

sue the drawer or drawee, though in the case of a bankruptcy of these parties, if the first acceptance were for the accommodation of the drawer, a court of equity will compel the acceptor *supra protest* first to resort to the drawer's estate. (5 Ves. 574). An acceptor for the honour of an indorser has no claim upon any party to the bill, subsequent to him for whose honour he accepted; but the indorser, for whose honour he accepted, and all the prior parties, the drawer included, are bound to make such satisfaction to such acceptor. (Beawes 49, 35, 44; Poth. pl. 113; Molloy, b. 2, c. 110, s. 24).

restricted to apply it to the use of the indorser only. The bankers are liable to the indorser for the amount of the bill.

GEORGE *v.* SURREY, E. T. 1830. N. P. *M. & M.* 516.

The indorsement may be by a mark,

A. B. DREW the bill by her mark, and it was indorsed by mark; the writing, "A. B., her mark," on the indorsement being in the plaintiff's hand. A witness was called to prove the indorsement, who stated, he had frequently seen A. B. make her mark, and so sign instruments; and he pointed out some peculiarity.

Tindal, C. J., admitted the evidence was sufficient.

PIKE *v.* STREET, T. T. 1828. N. P. *M. & M.* 226.

and may be made with a qualification.

INDORSEE against drawer. The defence was, that, though the plaintiff had given full value for the bill to the defendant, yet it was under an agreement that he should sue Miles, the acceptor of the bill, only, and should not sue the defendant as indorsee.

Lord *Tenterden*, C. J., in summing up, left it to the jury to say whether or no the plaintiff took the bill on the terms and conditions that he should have recourse to Miles, and him only, and not sue the defendant; if so, they should find for the defendant, such an agreement being a good bar to the action. If they did not believe that, then their verdict should be for the plaintiff.

(b) WITH REFERENCE TO THE PARTIES WHO MAY TRANSFER.

1. *In general.*

ADAMS *v.* OAKES, T. T. 1833. N. P. 6 *C. & P.* 70.

A party who receives a bill to get discounted may indorse.

INDORSEE against acceptor. It appeared that D. received a bill to get discounted, and which failing to obtain, he handed it over to the plaintiff to present, which was done, and not being paid was noted, and D. subsequently indorsed it to the plaintiff.

Gurney, B., held, that such indorsement was sufficient to entitle the plaintiff to sue on it, but that he could only recover the amount due from the acceptor to the drawer.

GWINNELL *v.* HERBERT, E. T. 1837. K. B. 5 *Ad. & E.* 436.

The rule that an indorser is a new maker, only applies to bills, not to notes.

THE declaration, by an indorsee against indorser of a note, described the defendant as the maker, and to whom no notice of dishonour had been given.

The Court held, that the rule that an indorser stood in the situation of a new maker, applied only to the case of a bill and not of a note, and that the plaintiff was not entitled to recover.

2. *As regards particular Persons.* See ante, Div. VI., p. 243.

(c) WITH REFERENCE TO THE TIME OF MAKING THE TRANSFER.

PAYNE *v.* IVES, H. T. 1823. K. B. 3 *D. & R.* 664.

A party who undertakes to

A. AND B. undertook to indorse any bill or bills S. might give P. in part payment of an order for lace, which was then being executed

for him; and the goods were delivered to S., who accepted a bill at eighteen months' date, which the plaintiff retained, without making any application to the defendants to indorse it, for the space of seventeen months, which was a few days previous to S. becoming insolvent.

The Court held, that, to make the surety liable, the demand must be made within a convenient and reasonable time; and that the plaintiffs having forborne to demand the indorsement for seventeen months, and not until S. had become insolvent, they were not entitled to the benefit of the guarantie.

indorse must be called on to do so within a reasonable time.

FRYER v. BROWN, 1824. N. P. 1 R. & M. 145.

ON this bill there were two indorsements by the same party, and an intermediate one.

Abbott, C. J., said, that the same party, having twice indorsed the bill, was strong to shew that the bill had been negotiated before it became due, and re-indorsed after it was dishonoured; that, unless the contrary was established, he should presume that the first indorsement was made before the bill became due.

Two indorsements on a bill by the same party, and an intermediate one, raises a presumption that the first was made before the bill became due.

**BURROUGH v. MOSS, H. T. 1830. K. B. 10 B. & C. 558—S. P.
STEEN v. YGLESIAS, M. T. 1834. Ex. 1 C., M. & R. 565.**

THE defendant gave to the husband a note payable to the wife or order, which the husband, after it was due, indorsed to the plaintiff.

The Court held, that the indorsee of the note after it was due was liable only to such equities as attached to the note itself, and not to claims arising out of collateral matters.

See Goodall v. Ray, 4 D. P. C. 76.

Taking a note after it is due, only subjects the party to difficulties attached to the note itself.

BAROUGH v. WHITE, T. T. 1825. K. B. 4 B. & C. 325; S. C. 6 D. & R. 379.

IN an action by the indorsee against the maker of a promissory note, payable with interest on demand, the plaintiff having proved that he gave value for it, the defendant tendered evidence of declarations made by the payee when the note was in his possession, that he, the payee, gave no consideration for it to the maker. It was contended, that where a party takes a bill or note overdue, he takes it on the credit of the indorser. (*Brown v. Davies*, 3 T. R. 80). That being so, it was not necessary, in this case, to bring home to the plaintiff knowledge of the note having been given to the payee without consideration; he was liable to all objections which would have defeated an action by the payee.

A note payable on demand is not deemed overdue until payment demanded and refused.

Per Cur.—It does not appear to us that this note could be considered as overdue. It is said, that, in *Banks v. Colwell*, cited 3 T. R. 80, *Buller, J.*, treated a note payable on demand as a note taken by an indorsee after it was due; we are not acquainted with all the circumstances of that case; payment might have been demanded before the indorsement; and, indeed, it is stated that several payments had been made on account. In this case, no demand was proved, and the note being made payable, *with interest*, makes it probable that the parties contemplated that the note would be negotiated for some time.

PARKIN *v.* MOON, H. T. 1836. N. P. 7 C. & P. 408—S. P. LEWIS
v. PARKER, E. T. 1836. K. B. 4 Ad. & E. 838; S. C. 6 N.
 & M. 294.

The presumption is, that the bill was taken before it became due.

THE defendant, Moon, pleaded that the bill was drawn in the name of the firm, by a person in partnership with him, for purposes not connected with the partnership, and was indorsed to the plaintiff *after it became due*. The plaintiff replied, that the bill was not indorsed to him after it became due, but was indorsed to him, and taken and received by him, *before it became due*.

Alderson, B., was of opinion, that this did not render it necessary for the plaintiff to give any evidence that the bill was indorsed to him before it became due, but that it was sufficient for him to put in the bill.

PENNY *v.* INNES, M. T. 1834. Ex. 1 C., M. & R. 439; S. C. 5 Tyrw. 107.

Where there is a special indorsement by the payee, and before his indorsee indorsed the defendant indorsed:—Held, it did not create such a new instrument as to require a new stamp.

THIS was an action on a bill of exchange. In the declaration, the bill was described as a bill drawn by N. Wilson upon H. Wilson & Co., to pay to his order 200*l.*; that N. Wilson indorsed to defendant, who indorsed to plaintiff, and R. Brookes, since deceased. It appeared that the bill was drawn by N. W. upon H. W. & Co., payable to his own order, and was accepted; and the following indorsements appeared on it:—"Pay Messrs. Brookes & Penny, or order. N. Wilson. J. R. Innes, Brookes, & Penny."

The Court held, that the indorsement from Innes to Brookes & Penny operated as a new bill between them; and, therefore, the latter could sue Innes, the real consideration moving from Brookes & Penny to Innes; and as it is an inherent property in all bills of exchange that an indorsement operates as a new bill between the indorser and indorsee, it was not necessary that there should be any other stamp than that which was on it originally.

(d) WITH REFERENCE TO THE EFFECT OF STRIKING OUT THE
 INDORSEMENT.

WILKINSON *v.* JOHNSON, M. T. 1824. K. B. 3 B. & C. 428.

Striking out the indorsement does not discharge the indorser, if by accident.

CERTAIN bills, having, amongst others, the indorsement of H. & Co., were presented by the defendants' agents for payment at the place of acceptance, and, being dishonoured, application was made to the plaintiffs, the agents of H. & Co., to take up the bills for their honour, which they did, and struck out the subsequent indorsements; but, almost immediately afterwards discovering the whole to be forgeries, gave notice thereof to the defendants and their agents on the same day, before post hours, and demanded to have the money repaid.

The Court held, that, by striking out the subsequent indorsements by mistake, the defendants were not deprived of their right to resort to the prior indorsers, and, therefore, furnished no defence to the action.

(e) WITH REFERENCE TO THE EFFECT OF MAKING THE INDORSEMENT.

PLIMLEY v. WESTLY, M. T. 1835. C. P. 2 *Bing. N. S.* 249; S. C. 2 *Scott*, 423.

THE defendant indorsed a promissory note, of which he was the holder, to the plaintiff, in discharge of a debt for goods sold and delivered. The direction to pay the note did not contain the words, "or order." It was presented for payment to the makers nine days after it became due, and was dishonoured. In an action against the defendant,

The Court held, that the plaintiff had no remedy upon it against the defendant for want of a new stamp, each indorsing being a new drawing for want of the words "or order."

Every indorsement on a bill not negotiable is a new drawing, and requires a new stamp.

LOWE v. COPESTAKE, H. T. 1828. N. P. 3 C. & P. 300.

A., B. AND C., three persons, separately indorsed a bill for the accommodation of the drawer, which was afterwards dishonoured and returned to them, and they paid the amount among them.

Best, C. J., held, that they might bring a joint action against a preceding indorser. "An indorsement in blank," says Lord *Ellenborough*, "conveys a right of action to as many as agree in suing on the bill." (*Ord v. Portal*, 3 Camp. 239).

A blank indorsement confers a joint right of action to as many indorsees as may agree to sue on a bill.

CAMIDGE v. ALLENBY, H. T. 1827. K. B. 6 B. & C. 373. S. P.

ROGERS v. LANGFORD, E. T. 1833. Ex. 1 C. & M. 637.

THE plaintiff, the purchaser of goods, delivered at Y., on a Saturday, about three o'clock, the notes of a country bank, payable on demand at H., forty miles distant from G, and fifty-two miles from the vendor's place of residence, which stopped payment at eleven o'clock of the same day, and he kept them, without presenting, until the following Saturday, when he required the defendants to take them back.

The Court held:—There is no guarantie implied by law in the party passing a note payable on demand to bearer, that the maker of the note is solvent at the time when it is so passed. But it may be otherwise if a person fraudulently pay such notes, with the knowledge, at the time, that the banker has stopped payment, and render such a party liable to an action.

See 2 Lord *Raymond*, 990.

The transfer of a bill, good for nothing, is a fraud, for which the drawer is liable

(f) WITH REFERENCE TO THE EFFECT OF MAKING THE TRANSFER WITHOUT INDORSEMENT.

FULLER v. SMITH, H. T. 1824. N. P. 1 *Ry. & M.* 49; S. C. 1 C. & P. 197.

THE plaintiffs (bankers of the alleged acceptors) discounted the bill for the defendants, bill-brokers, as agents for an indorser, but without the defendants' indorsement; upon the bill turning out, as regarded the drawer and acceptor, to be altogether a forgery—

Abbott, C. J., held, that the plaintiffs were entitled to recover the money back from the defendants, even though alleged to have been paid over by them to their principal.

* In general, a mere delivery, without indorsement, does not make the transferee liable on the instrument. *Rogers v. Langford*, E. T. 1833, Ex., 1 C. & M. 637. (See 5 Taunt. 492; 1 R. & M. 49).

Bill brokers, who get a bill, cashed as such, without indorsement by them, are liable, if the bill be a forgery, to the party so discounting*.

VAN WART *v.* WOOLLEY, M. T. 1824. K. B. 3 B. & C. 439; S. C. 5 D. & R. 174, Abridged post.

But handing a bill over, without indorsement, does not subject the party to the law of merchants, applicable to bills, &c.;

IN this case the Court held that a party, delivering a bill to another without indorsing it, does not subject himself to the obligations of the law merchant, and is not therefore entitled to the advantages.

GOODWIN *v.* COATES, 1832. N. P. 1 M. & Rob. 221.

but he is liable on the original consideration.

ASSUMPSIT for goods sold and delivered. A promissory note had been given in payment. It appeared that the defendant handed over the note to the plaintiff; the plaintiff wished him to indorse it, but the defendant refused to do so. The note fell due before the commencement of the action, and it was produced on the trial by the plaintiff.

Park, J., held the action maintainable.

XII. RELATIVE TO THE RATE OF INTEREST WHICH MAY BE TAKEN ON BILLS AND NOTES.

By 3 & 4 Will. 4, c. 98, on bills or notes, not having more than three months to run, any rate of interest might be taken.

By 3 & 4 Will. 4, c. 98, s. 7, it is enacted, "that no bill of exchange or promissory note, made payable at or within three months after the date thereof, or not having more than three months to run, shall, by reason of any interest taken thereon or secured thereby, or any agreement to pay, or receive, or allow interest in discounting, negotiating, or transferring the same, be void; nor shall the liability of any party to any bill of exchange or promissory note be affected by reason of any statute or law in force for the prevention of usury; nor shall any person or persons drawing, accepting, indorsing, or signing any such bill or note, or lending or advancing any money, or taking more than the present rate of legal interest in Great Britain and Ireland respectively, for the loan of money on any such bill or note, be subject to any penalties under any statute or law relating to usury, or any other penalty or forfeiture, any thing, or any law or statute relating to usury in any part of the United Kingdom to the contrary notwithstanding."

And by 1 Vict. c. 80, the period was extended to twelve months;

By 1 Vict. c. 80:—"Whereas, by an act passed in the fourth year of the reign of his Majesty King William the Fourth, intituled 'An Act for giving to the Corporation of the Governor and Company of the Bank of England certain privileges for a limited period, under certain conditions, Bills of Exchange and Promissory Notes, made payable at or within three months after the date thereof, or not having more than three months to run, and certain transactions in respect of such bills, were exempted from the operation of the statutes relating to usury,' and it is desirable to extend such exemptions; be it therefore enacted, that, from and after the passing of this act, and till the first of January, one thousand eight hundred and forty, no bill of exchange or promissory note, made payable at or within twelve months after the date thereof, or not having more than twelve months to run, shall, by reason of any interest taken thereon or secured thereby, or any agreement to pay, or receive, or allow interest, in discounting, negotiating, or transferring the same, be void; nor shall the liability of any party to any bill of exchange or

promissory note be affected by reason of any statute or law in force for the prevention of usury; nor shall any person or persons, or body corporate, drawing, accepting, indorsing, or signing any such bill or note, or lending or advancing any money, or taking more than the present rate of legal interest in Great Britain and Ireland respectively, for the loan of money on any such bill or note, be subject to any penalties under any statute or law relating to usury, or any other penalty or forfeiture; any thing in any law or statute relating to usury, or any other law whatever, in force in any part of the United Kingdom to the contrary notwithstanding.”

By 2 & 3 Vict. c. 37:—“Whereas, by an act passed in the first year of the reign of her present Majesty, intituled ‘An Act to exempt certain Bills of Exchange and Promissory Notes from the operation of the Laws relating to Usury,’ it was enacted, that bills of exchange, payable at or within twelve months, should not be liable, for a limited time, to the laws for the prevention of usury: And whereas the duration of the said act was limited to the first day of January, one thousand eight hundred and forty, and it is expedient that the provisions of the said act should be extended; Be it therefore enacted, that, from and after the passing of this act, no bill of exchange or promissory note, made payable at or within twelve months after the date thereof, or not having more than twelve months to run, nor any contract for the loan or forbearance of money, above the sum of ten pounds sterling, shall, by reason of any interest taken thereon or secured thereby, or any agreement to pay, or receive, or allow interest, in discounting, negotiating, or transferring any such bill of exchange or promissory note, be void; nor shall the liability of any party to any such bill of exchange or promissory note, nor the liability of any person borrowing any sum of money as aforesaid, be affected by reason of any statute or law in force for the prevention of usury; nor shall any person or persons, or body corporate, drawing, accepting, indorsing, or signing any such bill or note, or lending, or advancing, or forbearing any money as aforesaid, or taking more than the present rate of legal interest in Great Britain and Ireland respectively, for the loan or forbearance of money as aforesaid, be subject to any penalties under any statute or law relating to usury, or any other penalty or forfeiture, any thing in any law or statute relating to usury, or any other law whatsoever, in force in any part of the United Kingdom, to the contrary notwithstanding: Provided always, that nothing herein contained shall extend to the loan or forbearance of any money upon security of any lands, tenements, or hereditaments, or any estate or interest therein.”

By 3 & 4 Vict. c. 83:—“Whereas the duration of the 2 & 3 Vict. c. 37, was limited to the 1st day of January, 1842, and it is expedient that the same should be continued for a longer period; Be it therefore enacted, that the said recited act shall be continued until the 1st day of January, 1843.”

and the provisions of that statute were continued by 2 & 3 Vict. c. 37; but the bill or note must be above 10l.*

And by 3 & 4 Vict. c. 83, the 2 & 3 Vict. is to be in force until Jan. 1843

* Before the passing of those statutes, if the bill were tainted with usury in its inception, or if it was necessary for the holder to make title through any party guilty of usury, (*Lowes v. Muzzaredo*, 1 Stark. 385), he could not recover, though he had no notice of the usury. But, by the 58 Geo. 3, c. 93, no bill or note, though given for an usurious consideration, or upon a usurious contract, was void, in the hands of an indorsee for value, unless he had notice at the time of taking the bill, that it had been given for an usurious consideration.

VALLANCE v. SEDDEL, M. T. 1837. Q. B. 6 *Ad. & E.* 932.

In construing the 3 & 4 Will. 4, c. 98, it was decided, that it protected notes payable on demand.

ACTION on two promissory notes, payable on demand:—Plea, that, before the making of the said promissory notes, it was corruptly agreed between the defendant and Joseph Ward, the payee, that the sum of 45*l.* should be advanced, and that the defendant should pay him 5*l.* over and above 5*l.* per cent., and that the promissory notes should be given to secure the repayment of the said sum of 45*l.* and 5*l.*, and interest; and it was averred, that, in pursuance of the said corrupt agreement, the notes were given, the sum of 34*l.* 11*s.* 1*d.* being advanced by the said Joseph Ward for one note, and 22*l.* for the other.—Replication, that, before the payment of the notes had been demanded of the defendant, according to their tenor and effect, the plaintiff became the indorser thereof from Broomhead, for valuable consideration, for money due to the plaintiff for work and labour, without notice that they had been originally given for an usurious consideration, or on an usurious contract.—Demurrer.

The Court held, that the provisions of the 3 & 4 Will. 4, c. 98, were not confined merely to bills drawn for a certain time not having more than three months to run, but applied also to such as were payable on demand.

HOLT v. MIERS, E. T. 1839. Ex. 5 *M. & W.* 168.

And an agreement to renew a note, payable at one month, as often as it should become due,

AN agreement was made between A. and B., that A. should lend B. a sum of 200*l.* at 1*s.* in the pound per month, and that it should be a continuing loan for so long a time as the parties should please; and it was agreed, that, to evade the usury laws, promissory notes should be given at one month after date, and renewed at interest of 1*s.* in the pound per month. In pursuance of this agreement, A. lent B. 20*l.*, for which B. gave A. 1*l.*, and made his promissory note for 20*l.*, payable one month after date to H. as an agent and trustee for A. In an action on the note by H. against B.—

The Court held, that (under 1 Vict. c. 80) this is a real and valid instrument by the statute referred to. We must look at the act, and interpret it according to the words *themselves*, unless there is some manifest absurdity or inconsistency with other parts of the same statute. This is not a case of “interest secured thereby,” as the interest had been paid, and this note was to secure the principal. The plea attempts to make the statute of usury a defence, but the statute 1 Vict. c. 80, makes that defence unavailable.

CONNOP v. YEATES, M. T. 1834. K. B. 4 *N. & M.* 302; S. C. 2 *Ad. & E.* 326.

even though a warrant of attorney was given to secure the payment of the bill or note, is protected.

A WARRANT of attorney had been given for the full amount of a bill given for the price of goods, and usurious interest, but the bill was at three months within the 3 & 4 Will. 4, c. 98, s. 7. On motion to set aside the judgment on the warrant of attorney—

Per Cur.—The section provides, that the liability of any party to a bill of exchange or promissory note payable within three months, shall not be affected by reason of any statute or law in force for the prevention of usury. This is the liability of a party to bills of exchange within the protection of that act. If we were to say, that a warrant of attorney given to secure the amount of these bills was

not within the clause, we should be deciding, that the liability of the party is affected by reason of the interest taken upon those bills exceeding the ordinary rate of interest.

XIII. RELATIVE TO ACCOMMODATION BILLS.

BAGNALL v. ANDREWS, M. T. 1830. C. P. 7 *Bing.* 217; S. C. 4 *M. & P.* 839.

IN an action on a bill of exchange, it appeared, that, at the time of accepting the bill, the drawer and acceptor having mutual dealings, and in ignorance of the state of the account, it being in fact in favour of the acceptor; and, before other bills became due, the drawer had become insolvent; and whilst avoiding other creditors, upon being pressed by the plaintiff, a creditor, indorsed this bill to him after an act of bankruptcy, upon which a commission was afterwards sued out; the bankrupt having been called, and the Judge having directed the jury to say, whether, under the circumstances, the transaction was a *bonâ fide* transfer, they found for the defendant.

The Court held, that such a bill could not be considered an accommodation bill; and, therefore, there was no implied undertaking to indemnify the acceptor and the bankrupt.

Where, at the time of drawing a bill, there is reasonable expectation it will be paid by the acceptor, it is not an accommodation bill.

HEYWOOD v. WATSON, H. T. 1828. C. P. 4 *Bing.* 496; S. C. 1 *M. & P.* 268.

THE plaintiffs were bankers. A. and B. had an account with them; and they wishing to overdraw it, the plaintiffs consented on B.'s giving them his note for 2000*l.* A. afterwards gave B. his note for 1000*l.* as an indemnity to him for a moiety of his liability to the plaintiff on his note. The advances amounted to 1300*l.*, which being unpaid, B. indorsed A.'s note to the plaintiffs, who sued A. on it.

The holder of an accommodation bill may sue, unless it be shewn he has knowledge of the fact.

The Court held, in the absence of any evidence to shew that the plaintiffs knew that the note by A. to B. was without consideration, they had a right to sue on it as legal holders.

JOHNSON v. PECK, 1820. N. P. 3 *Stark.* 66.

FOR A. and B., who were partners, the defendant, at the request of A., accepted the bill in question, drawn by F., payable to his own order. F. indorsed the bill to the firm of A. & B. in payment of a debt due from him to A. & B. A., before the bill was accepted, promised the defendant, that he would furnish him with funds when the bill became due, unknown to B.

Hence, the assignees of a bankrupt, who was the holder of an accommodation bill, cannot recover.

Holroyd, J., held, in an action at the instance of the assignees of A. & B., that they were not entitled to recover.

SPARROW v. CHISMAN, H. T. 1829. K. B. 9 *B. & C.* 241.

A PARTNER in a banking-house, for his own accommodation, drew bills upon the defendant, and caused the defendant to accept, he (the partner) undertaking to provide for them; and afterwards, being indebted to the firm of which he was a member, he indorsed them for a valuable consideration to the firm.

So, if an accommodation bill, given to one of several partners, be transferred to the

firm, they cannot sue if the single partner could not.

The Court held, that an action on the bill could not be maintained by the firm of which that partner was one, it being a general rule, that where the facts of the case are such, that one of several plaintiffs could not recover against the defendant if the cause of action were considered as accruing to him alone, he cannot sue in conjunction with the other plaintiffs, although they may not have been parties to the facts which would deprive the other plaintiff from suing alone.

LOWE v. COPESTAKE, H. T. 1828. N. P. 3 C. & P. 300.

But several persons, who have indorsed an accommodation bill, and paid their portions, may join in an action against a previous indorsee.

THREE persons, not partners in trade, had separately indorsed the bill for the accommodation of the drawer, and, on its being dishonoured, had paid in equal portions the amount to a party who had discounted it subsequently to their indorsements. In a joint action by them against a previous indorsee—

Per Best, C. J.—If several persons, not partners in business, separately indorse for the accommodation of the drawer a bill of exchange, which has been previously indorsed by another person; and, on the bill being dishonoured, pay the party who has discounted it in equal proportions, they may strike out their own indorsements, and bring a joint action against such previous indorser to recover the amount of the bill.

SHAW v. BROOM, M. T. 1825. K. B. 4 D. & R. 730.

A statement by an indorser after indorsement, that it was an accommodation bill, does not affect his indorsee's right.

THE drawer of a bill, being clearly indebted to the plaintiff (the holder), gave it whilst current as a valid security.

The Court held, that his subsequent declaration, that he had received it from the acceptor without consideration, was inadmissible, and could not defeat the plaintiff's title to recover. Semble, if the plaintiff had brought the action as trustee for, or recovering through, the title of the party from whom he received it, such declaration would have been admissible.

SMITH v. DE WRUITZ, H. T. 1825. N. P. 1 Ry. & M. 212.

So, if made while the bill is current.

A DEFENDANT accepted a bill without value, and delivered it to A. for the purpose of his giving it to B., who, instead of doing that, ran away with the bill, and upon being pursued by the plaintiff, a creditor, gave it to him.

Abbott, C. J., held, that declarations made by a holder while the bill is current were inadmissible against a subsequent holder, who acquired the bill before it became due.

ROLFE v. WYATT, M. T. 1831. N. P. 5 C. & P. 181.

The indorsee of an accommodation bill, receiving part from the drawer and a new bill, does not discharge the acceptor.

INDORSEE against the acceptor. It appeared, that the acceptance was given as an accommodation to the drawer; but it did not appear that this fact was known to the plaintiffs. When the bill became due, the drawer applied to the plaintiffs, the holders, and paid them 10*l.* on account, and got them to take another bill for the remainder.

Tindal, C. J., told the jury.—The question for your consideration is, whether, when the second bill was taken, there was an *express*

agreement, that the bill with the defendant's name to it should be given up; for, if so, then the plaintiffs cannot recover.

HARRISON v. COURTAULD, H. T. 1831. K. B. 3 B. & Ad. 36.

THE indorser of an accommodation acceptance, upon the bankruptcy of the drawer, entered into an arrangement with the assignees of some claims he had upon the estate, and gave them a release of all demands, but no mention was made of the dishonoured bill; he then knew it was an accommodation bill, but did not at the time he took it.

The Court held, that the acceptor was not discharged.

So, an arrangement with the drawer, not specifically mentioned in the bill, does not discharge the acceptor*.

ROACH v. THOMPSON, H. T. 1830. N. P. 1 M. & M. 487.

AN accommodation acceptor was sued by a bonâ fide holder.

The Court held, that, as he ought to have paid it when demanded, he could not recover the costs against the party to whom he had lent his acceptance.

An accommodation acceptor cannot recover against the drawer the costs of an action brought against him †.

XIV. RELATIVE TO BILLS AND NOTES WHICH HAVE BEEN LOST.

HANSARD v. ROBINSON, T. T. 1827. K. B. 7 B. & C. 90; S. C. 9 D. & R. 860; S. C. 1 R. & M. 404, n.

IN an action by the indorsee against the acceptor of a bill, lost after it became due, and after application made to the defendant, who had requested time, and promised payment, the signatures of the parties and particulars of the bill having been proved, it was contended, that evidence that a bill of exchange was lost after it was due will not entitle a holder to recover at law from the acceptor. The bill must be produced, or evidence given of its destruction.

Per Cur.—The meaning of an acceptance must be taken to be, that the acceptor will pay the amount upon the bill being delivered up to him; and if the bill be not delivered up to him, he may retract his offer. It is due to the acceptor that this should be so; for, how is he to be satisfied for the alleged loss of the bill; and if it should be found and produced against him, why should he be subject to the inconvenience of proving all these circumstances? Can the holder by his own negligence or misfortune cast such a responsibility upon the acceptor? We think he cannot. He has his remedy however, for equity will assist him.

At law, the amount of a lost bill cannot be recovered, as the acceptor is entitled to the bill, unless its actual destruction can be shewn ‡;

* So, it is no discharge where a composition-deed is entered into by the party for whom the bill is accepted, with his creditors, with a clause reserving the remedies against sureties. (*Nichols v. Norris*, 3 B. & Ad. 41, notes; supporting *Fentum v. Pocock*, 5 Taunt. 192. See *Carstairs v. Rolleston*, Id. 551; *Thomas v. Courtney*, 1 B. & Ald. 1; and *Ex parte Glendinning*, 1 Buck, B. C. 517).

† At *Nisi Prius* it was decided, that, in an action by the acceptor of an accommodation bill against the drawer, under the common counts he could not recover the costs of an action brought against him; but the declaration must be special. (*Seaver v. Seaver*, 1834, N. P., 6 C. & P. 673).

‡ In a suit on a lost bill of exchange, the indemnity being disputed, and found to be proper by the Master, defendant objecting to it—held liable to costs subsequent to the original hearing. (*Macartney v. Graham*, 2 Russ. & M. 353).

WOODFORD *v.* WHITELEY, T. T. 1830. N. P. 1 *M. & M.* 517.

although an indemnity be offered.

THE creditor received an acceptance of the debtor as payment.

Parke, J., who tried the cause, held, that proving it to be lost was not sufficient to render the latter liable to the debt, without going further, and shewing it to be destroyed, although an indemnity was offered.

SLATER *v.* WEST, H. T. 1828. N. P. 3 *C. & P.* 325.

Whether a lost bill was taken *bonâ fide*, is a question for the jury*.

A TRADER received from a stranger, in part payment of goods, a bill which had been lost, the party paying representing to the trader, that he had been recommended to him by a customer of his, and directing the goods to be sent to a place not a regular booking-office, and there was no evidence that the newspaper advertizing the loss ever came under his view.

Lord Tenterden, C. J., having left it to the jury to say, whether the bill was received out of the ordinary course of business, and under circumstances which should have excited suspicion and inquiry, and they having found for the defendant, the acceptor, the Court, deeming it a case peculiarly for the consideration of a jury, refused a new trial.

GILL *v.* CUBITT, M. T. 1824. K. B. 3 *B. & C.* 466; S. C. 5 *D. & R.* 324; S. C. 1 *C. & P.* 163.

A bill-broker, who discounts a stolen bill, must be the loser, if he does not know from whom he took it, merely knowing the party by sight will not do.

THE drawer of a bill of exchange, after it was accepted, put an indorsement in blank on it, and inclosed it in a parcel directed to go into the country, and had the parcel booked. On the next day, a person, whose name was unknown, but whose features were familiar, brought the bill to a bill-broker, and requested him to discount it. The bill-broker took time for two hours to make inquiries respecting the acceptors; and then, after the person had written a name on the back of the bill, he discounted it, without making any inquiries as to the person himself, his address, or the manner in which he became possessed of the bill; and did not keep a memorandum of the number of the note, with which the payment was made. The bill was returned to the broker, and by him paid.

The Court held, that the bill-broker had not acted with reasonable caution, and could not, therefore, maintain an action against the acceptors.

GLOVER *v.* THOMSON, T. T. 1826. N. P. 1 *R. & M.* 403.

But the amount of a bill proved to be set out correctly in the declaration, and overdue, being lost by the attorney's clerk, may be recovered.

IN an action on a bill of exchange, it appeared, that the bill, after being delivered to the clerk to prepare the declaration, which was proved to have set it out correctly, was lost, and the maturity of the bill and indorsement being proved:—Held,

Per Abbott, C. J., that the plaintiff was entitled to recover.

* The proposition is to be determined by the jury, where a bill has been improperly obtained, and previously discounted, whether the plaintiff took the bill under circumstances amounting to "gross negligence," and not merely, whether it was taken "without due caution," or under circumstances as ought to have excited suspicion. (*Crook v. Jadis*, 6 *C. & P.* 191).

GOODMAN *v.* HARVEY, T. T. 1836. K. B. 6 *N. & M.* 372; S. C. 4 *Ad. & E.* 870.—S. P. CROOK *v.* JADIS, H. T. 1834. K. B. 3 *N. & M.* 257.

IN an action on a bill of exchange, which had been lost or obtained by fraud, after it had been protested for non-payment, and had the notarial mark on it—

The Court said, we are all agreed, that gross negligence, though it may be evidence of mala fides; yet, not being the same thing, would not defeat the right of a party to recover who had given a consideration for the bill. Where the bill has passed to the plaintiff without any proof of bad faith in him, there is no objection to his title.

The bonâ fide holder of a lost bill may recover if gross negligence be not proved.

BACKHOUSE *v.* HARRISON, H. T. 1834. K. B. 3 *N. & M.* 188.—S. P. CROOK *v.* JADIS, H. T. 1834. K. B. 3 *N. & M.* 257.

IN an action by an indorsee of a bill of exchange against an indorser who had lost the bill by accident. The evidence shewed, that the plaintiff took the bill under circumstances in which a prudent cautious man would not have taken it without inquiries as to the title of the holder.

Mere want of due caution does not prevent him.

Per Cur.—It is a dangerous rule to lay down, that a party shall not recover where he takes a bill under circumstances in which a cautious man would have exercised more circumspection. We cannot approve of the doctrine, and we, therefore, hope it will be stopped. Where a party receiving a bill has been guilty of fraudulent conduct connected with the receipt of it, we can understand the principle upon which it is held, that he ought not to recover. Bad faith we can comprehend, but not a mere want of caution.

DOWN *v.* HALLING, T. T. 1825. K. B. 4 *B. & C.* 330; S. C. 6 *D. & R.* 455; S. C. 2 *C. & P.* 11.

Per Bayley, J.—If a bill, note, or cheque be taken after it is due, the party taking it can have no better title to it than the party from whom he takes it; and, therefore, cannot recover upon it, if it turns out that it has been previously lost or stolen.

But the finder of a bill overdue, or his transferee, if aware of the fact, has no right to retain it.

XV. RELATIVE TO BILLS AND NOTES WHICH HAVE BEEN FORGED.

WILKINSON *v.* JOHNSON, M. T. 1824. K. B. 3 *B. & C.* 428; S. C. 5 *D. & R.* 403.

THREE bills of exchange were presented for payment at the place named in the acceptance. The notary public observing among the indorsements the names of Heywood & Co., country bankers, to whom the plaintiffs were the town bankers, applied to them to pay the bills for the honour of the country bankers. The bills were immediately paid, and the clerk struck his pen through the names of the subsequent indorsees. Before five o'clock it was discovered that the bills had been forged, and also the names of Heywood & Co. Notice was immediately given to the defendants, for whom the notary had presented the bills, and a demand was made for repayment of the money, which was refused. The defendants had sufficient time to give the subsequent indorsees notice of the dishonour.

Payment of a forged bill by an innocent party to one not wholly free from blame, may be recovered back where notice of such payment was given before post-time of the same day.

The Court held—first, that the money had been paid through a mistake, arising as much from the fault of the defendants as from the negligence of the plaintiffs; and as notice of it had been given to the defendants in time to secure themselves from loss, that they ought not to claim the money;—secondly, that, as the erasure of the indorsements was made by a mistake, capable of explanation, it did not vary the rights of the parties.

COCKS *v.* MASTERMAN, T. T. 1829. K. B. 9 B. & C. 902.

But a banker, who has paid a forged acceptance to a bonâ fide holder, who does not give notice until the next day, is too late to recover back the money.

A BILL (with a forged acceptance) was presented, in the ordinary course, by the bonâ fide holders, to the bankers of the supposed acceptor. They, under the belief that the acceptance was genuine, paid the bill. The forgery was discovered on the following day, and notice given to the parties who had received the money, and to the other parties. In an action by the bankers, to recover back from the persons who received the money the amount thus paid—

The Court held, that the holder of a bill, being entitled to know, on the day it becomes due, whether it is an honoured or dishonoured bill, that he may, if he thinks fit, take steps on that day against the parties to the bill; the parties who pay the bill ought not, by any negligence in satisfying themselves whether the acceptance is genuine or not, to deprive the holder of that right; the bankers having therefore suffered him to retain the money during the whole of that day, they could not recover it back.

EAST INDIA COMPANY *v.* TRITON, M. T. 1824. K. B. 3 B. & C. 280; S. C. 5 D. & R. 214.

So, a payment under a power of attorney (forged), and not on the strength of the indorsement on the bill, precludes the party paying from suing the party so indorsing, to recover back the money on the ground of his warranty.

AN English merchant, resident at Fort St. George, in the East Indies, executed a power of attorney to his correspondent in England, in the common general form. A servant of the East India Company, by the direction of the Governor in Council, drew three bills of exchange on the Company, payable in London, in favour of that merchant. The correspondent received the bills; they were accepted by the Company; and the correspondent indorsed and delivered them to a firm of merchants, who, having also indorsed them, paid them in account to their bankers, but almost immediately drew the amount thereof out of the hands of the bankers. The bankers, having put their names on the back of the bills, sent them, when due, to the Company for payment. The Company after inspecting the power of attorney, paid the amount of the bills. The English merchant died; and his administrator de bonis non recovered the amount of the bills from the Company, in consequence of the Court deciding that the correspondent had not authority, by the power of attorney, to indorse bills. The Company gave notice of that judgment to the bankers, who at that time had no proceeds in the hands of their customers. The East India Company brought an action against the bankers, on the ground that their names being on the bills was a warranty that the prior indorsements were legal. In a special verdict, the jury found that the Company paid the bills, not on the faith of the indorsements of the bankers, but on faith of the power of attorney.

The Court held that the action could not be maintained, for that

no such warranty could be implied from the indorsements; and if it could, the facts of the case shewed that the Company did not act upon it.

JOHNSON *v.* WINDLE, M. T. 1836. C. P. 3 *Bing. N. S.* 225; S. C. 3 *Scott*, 606.

A PROMISSORY note, payable to the payees or order, was stolen from the payees, the plaintiffs, before they indorsed it; their indorsement was afterwards forged, and the note duly paid by the makers, the defendants, when due. In an action of trover against the defendants for the note—

Per Cur.—The general rule, it cannot be denied, is, that no title is or can be acquired by a forged indorsement on a bill or note; and the only argument which we have heard used for the purpose of taking this case out of the ordinary rule applicable to forgeries of this description, and preventing the defendants from being wrongdoers, and guilty of a wrong conversion as to the plaintiffs, is founded upon the gross negligence of the plaintiffs themselves. Now, the degree of negligence or carelessness of which the plaintiffs are said to have been guilty, is not stated or alleged; for aught that appears, they may have used all the precaution and all the care which men in their situation were bound to have used, and which others were entitled to expect at their hands. As it appears to us, our judgment should be in favour of the plaintiffs, who have made out to the satisfaction of the Court every requisite which is necessary to the maintaining of an action of trover, viz. the right of property in the note in them; that such right did not pass to another; and a conversion by the defendants in appropriating the note to their own use.

However, where the payee lost a note, not indorsed, and his name was forged and the note passed away, and afterwards paid by the maker:—Held, that trover was maintainable against the maker, no title passing by the forgery.

COOPER *v.* MEYER, H. T. 1830. K. B. 10 *B. & C.* 468—S. P. REYNOLDS *v.* ROBERTSON, M. T. 1839. K. B. 3 *P. & D.* 611.

THE defendants accepted bills drawn in fictitious names, and it was supposed, that the handwriting of the supposed drawer and indorser were the same.

The Court held, that a party accepting, without inquiry as to the reality of the person drawing, must be considered as undertaking to pay to the signature of the person actually drawing the bills.

See 7 Taunt. 455.

An acceptor of a bill, drawn by a fictitious drawer, is liable.

HALL *v.* FULLER, T. T. 1826. K. B. 5 *B. & C.* 750.

THE plaintiffs kept cash at the house of the defendants, who were bankers. The plaintiffs having occasion to pay a sum of 3*l.* to a tradesman, drew a cheque for the amount upon the defendants, and delivered it to the payee, who told them it was wanted to send into the country. It was drawn and filled up by one of the plaintiffs in the usual form, signed in the name of the firm, payable to the payee or bearer, with the plaintiffs' signature and the date. When the cheque was presented for payment three days afterwards, it had been altered by the persons to whom the tradesman had paid it. The alteration consisted of the expunging the whole filling up in the body of the cheque, and restoring it with this difference, that the sum filled up was 200*l.* instead of 3*l.* This was done in such a

If a bill be altered to a larger amount, and the acceptor pay it, he cannot charge the drawer with it.

manner that no one in the ordinary course of business would have observed it. No suspicion being entertained by the defendants' clerks, it was paid at the counter as a matter of course. At that time the plaintiffs' balance in the defendants' hands amounted only to 183*l.* 15*s.* 5*d.* In no former instance had the plaintiffs overdrawn their account, and had never given the defendants notice that they wished to have credit beyond the balance in hand. The plaintiffs finding afterwards that the account was overdrawn, the fraud was detected, and they called upon the defendants to indemnify them for the money which they had so paid without their authority; which the defendants refusing to do, this action was brought. The question for the opinion of the Court was, whether the action was maintainable, either for the whole or any part of the amount of the cheque.

The Court were of opinion, that the risk of forgery as between the banker and the customer must be the risk of the banker. He was not justified in paying any money without the authority of the customer to pay that particular sum; and they thought that it was immaterial whether a cheque was forged in the whole or in part. The final question was, to what amount had the customer authorized payment. Here, the banker had a cheque, which in fact as well as in law was forged, although the signature was genuine. He had, therefore, in his own wrong and at his own loss paid a sum which he could not charge to his customer.

Judgment for the plaintiffs. _____

GRIFFITHS *v.* PAYNE, H. T. 1839. Q. B. 3 P. & D. 107.

The defence of forgery must be supported by the same evidence as an indictment.

IN an action by first indorsee against the acceptor of a bill of exchange—Plea, non accepit—

The Court held, that evidence is not admissible to shew, that the drawer had forged the defendant's acceptance to other bills, that the drawer absconded, and that then several bills, some of them with forged acceptances, were taken from a box in his house by the plaintiff's brother, and came into possession of the plaintiff; unless it can be shewn that the bill in question was one of such bills. To prove the forgery, such evidence can only be received as would have been admissible in an indictment against the drawer for the forgery.

XVI. RELATIVE TO THE EFFECT OF TAKING A BILL OR NOTE.

HADWEN *v.* MENDISABEL, T. T. 1825. C. P. 10 *Moore*, 477; S. C. 2 C. & P. 20.

Plaintiff may resort to the original consideration, though the bill remains within his control; it is for the defendant to shew the bill was given and paid.

IN an action for goods sold and delivered it appeared, that the defendant gave the plaintiff bills of exchange in payment, which were dishonoured, and that the latter afterwards transferred them to J. S., who gave his acceptances for them, and that the original bills were still in existence.

Best, C. J., observed, that it was proved at the trial that the original bills were in the possession of the plaintiff's agent, and he was of opinion that he had a right to retain them until the defendant was ready to pay. A plaintiff may declare for goods sold

and delivered as the consideration for which a bill is given, without declaring on the bill itself, so as to throw the onus of giving the bill and payment on the other party.

VYSE v. CLARKE, M. T. 1832. N. P. 5 C. & P. 403.

IN an action for goods sold, it appeared, that the traveller of a tradesman in London called on his employer's debtor in the country, and, being unable to obtain cash, consented, at the request of the debtor, to take an acceptance for the amount, and wrote the whole form of a bill, except the name of the drawer, and sent it up to his employer, telling the debtor that he did not think it would be satisfactory. The employer kept the bill, but did not put his name to it as drawer. The traveller had no authority to sign bills, but was in the habit of sending them up without a drawer's name to prevent risk by loss.

And a traveller taking a bill which his master does not accept, does not preclude the latter from suing for goods sold, &c.

Per Vaughan, B.—I think, if the traveller had no authority to sign the bill, and the plaintiff did not adopt the bill afterwards, it is no bill drawn by the plaintiff. There must be a drawer to a bill. I do not say that a person may not so deal with such an instrument as to make it a bill; but, in this case, I do not think that the facts warrant the conclusion that any bill was drawn.

ALDERSON v. LANGDALE, T. T. 1832. K. B. 3 B. & Ad. 660.

THIS was an action of assumpsit brought by the plaintiff, as indorsee of a bill of exchange, against the defendant, who was the drawer. The declaration also contained a count for goods sold and delivered. It appeared, that the bill was indorsed by the drawer to the plaintiff in payment of the goods sold by the plaintiff to him; and that the plaintiff, after the bill had been accepted, altered the time of payment from four to three months. *Tenterden, C. J.*, was of opinion at the trial, that, the bill being vitiated by the alteration, the plaintiff might resort to the original consideration, and recover the price of the goods, although the defendant might have a cross action for the special damage sustained by the alteration of the bill; and the jury in consequence found a verdict for the plaintiff, leave being given to the defendant to move to enter a nonsuit. A rule nisi having been obtained accordingly—

But, a party, who by laches makes a bill his own, cannot resort to the original consideration.

Lord Tenterden, C. J.—In this case we have come to the conclusion, that the opinion which I expressed at the trial, viz. that the plaintiff was entitled to recover on the count for goods sold, cannot be supported. It is perfectly clear, that a bill of exchange will operate as a satisfaction of a preceding debt, if the holder make it his own by laches, as by not presenting it for payment when due. Here, we think that the plaintiff, by altering the bill in a material part, made it his own as against the defendant, and caused it to operate as a satisfaction of the debt for which it was originally given. Allowing the plaintiff to recover the value of the goods in this action, and the defendant to bring a cross action for the special damage sustained by reason of the destruction of the bill, would lead to a multiplicity of actions, which is against the policy of the law. For these reasons, we are of opinion that the rule for entering a nonsuit must be made absolute.

WOODFORD *v.* WHITELEY, T. T. 1830. N. P. M. & M. 517.

In fact, in point of law, taking a bill in discharge of a debt is a payment.

INDORSEE against the drawer of a bill of exchange for 30*l.* After the bill became due, the defendant had paid 15*l.* by his own acceptance of a bill to that amount. This bill was proved to have been lost.

Parke, J., told the jury, that they must deduct this bill from the amount of their verdict; that, unless it was produced or shewn to be destroyed, the defendant would still continue liable upon it, and it might at any time be produced against him. Verdict for plaintiff, 16*l.*

BUNNEY *v.* POINTZ, H. T. 1833. K. B. 1 N. & M. 229; S. C. 4 B. & Ad. 568.

So, it is a waiver of a party's lien.

THE defendant employed an agent to sell a certain quantity of hay in a stack, which he did to one C. T., and took his promissory note, payable at three months to the agent himself, for the price. The agent immediately discounted the note with the plaintiffs, his bankers. The purchaser, at several times within the three months, carried away several tons of hay, and afterwards sold the remainder to the plaintiffs, allowing the note given by him to the agent to be taken as part payment, and receiving a further sum. The agent afterwards became bankrupt, and, upon demand being made by the plaintiffs (after the three months had elapsed) to be allowed to take away the rest of the hay, the defendant refused. In an action of trover for the hay—

The Court held, 1st, that the fact of part having been delivered did not take away the defendant's lien; but, 2ndly, that the defendant could not be considered as an unpaid vendor, having taken the note in payment, so as to revive the right of lien upon the expiration of the time for which the note was to run.

XVII. RELATIVE TO THE EFFECT OF TAKING ONE BILL AS A RENEWAL OF ANOTHER.

KENDRICK *v.* LOMAX, E. T. 1832. Ex. 2 C. & J. 405; S. C. 2 Tyrw. 439.

Where one bill is taken to renew another, the first cannot be sued on before the dishonour of the second.

INDORSEE against acceptor. It appeared that, after a bill of exchange became due, and whilst it was in London, where it had been sent for presentment for payment, the person who had indorsed it to the plaintiff came to him with another bill for the same amount, and prevailed on him to take it for and on account of and in renewal of the first bill. Before the second bill became due, and without delivering it back, the plaintiff brought an action upon the first bill against the acceptor.

The Court held, that, as the plaintiff could not recover unless the defendant were shewn not to be liable on the latter bill, the want of title to recover the principal precluded him from recovering any necessary charges, as noting and postage, and which might not necessarily have been incurred.

LUMLEY *v.* MUSGRAVE, M. T. 1837. C. P. 4 Bing. N. S. 9; S. C. 3 Scott, 238.—S. P. LUMLEY *v.* HUDSON, M. T. 1837. C. P. 4 Bing. N. S. 15; S. C. 3 Scott, 238.

But it must be in full satisfac-

A BILL of exchange in the hands of the plaintiff's testator, the indorsee, was dishonoured when due. After an interval of some

months, a renewed bill was given for the amount of the old one, which always remained in the possession of the indorsee, and which renewed bill was paid before the commencement of the suit. In an action by the plaintiff as executor, to recover interest upon the old bill, and a plea that the defendant and indorsee had agreed that the renewed bill should be given and accepted in full satisfaction and discharge of all demands arising out of the old bill—

Tindal, C. J., left it to the jury to say, whether the agreement in the first plea was proved; which they found in the negative, and a verdict passed for the plaintiff. On motion for a new trial—

Per Cur.—The only question is, whether the second bill was given in full satisfaction of all cause of action. There was no evidence to shew it was given for such cause, nor were there any circumstances from which such agreement could be inferred. The verdict was right.

tion and discharge of the old bill.

XVIII. RELATIVE TO THE PAYMENT OF A BILL OR NOTE.

(a) WITH REFERENCE TO THE TIME WHEN A BILL OR NOTE BECOMES DUE AND PAYABLE*.

1. When payable on Demand.

BAROUGH v. WHITE, T. T. 1825. K. B. 4 B. & C. 325; S. C. 6 D. & R. 379.

In an action by the indorsee of a note payable on demand, with interest, against the maker—

The Court held, that, as such a note purported to be a continuing security, and no demand, it could not be considered overdue.

See Norton v. Ellam, 2 M. & W. 461.

A note payable on demand purporting to be a continuing security, there must be a demand†.

CAMIDGE v. ALLENBY, H. T. 1827. K. B. 6 B. & C. 373; S. C. 9 D. & R. 391.

THE defendant, the purchaser of goods delivered at Y., on a Saturday about three o'clock gave notes of a country bank, payable on demand at H., forty miles distant from Y., and fifty-two miles from the vendor's place of residence; the bank stopped payment at 11 o'clock of the same day, and the vendor kept the notes without presenting until the following Saturday, when he required the defendant to take them back.

The Court held—1st. The holder of bank-notes is bound to present them for payment, and give notice in the ordinary course, though the banker has stopped payment and is notoriously insolvent. 2nd. And it is no excuse for the want of presentment and

There is no implication of law, that, at the time of the delivery of a country note, payable on demand, the maker is solvent: hence, such note must be presented, and notice of dishonour given.

* The three days of grace allowed in this country are reckoned *exclusive* of the day on which the bill falls due, and *inclusive* of the last day of grace. Where there are no days of grace, and the bill falls due on a Sunday, Christmas-day, Good Friday, public fast or thanksgiving-day, or where the last of the days of grace happens on such a day, the bill becomes payable on the day preceding; and, if not then paid, must be treated as dishonoured. A presentment for payment before the expiration of the days of grace is premature, and will not enable the holder to charge the antecedent parties.

† A note payable on demand, with interest until paid, is not to be considered as payable instantly. (*Gascoyne v. Smith, 1 M'Clel. & Y. 338. Sed vide Norton v. Ellam, 2 M. & W. 461.*)

notice, that the banker had stopped payment at the time when the holder received the notes, the payee and receiver of the notes being then ignorant of that fact. There is no guarantie implied by law in the party passing a note payable on demand to bearer, that the maker of the note is solvent at the time when it is so passed.

JAMES v. HOLDITCH, T. T. 1827. K. B. 8 D. & R. 40.

But, it seems, there is no obligation to present a country note, payable on demand the next day;

THE plaintiff's servant received bankers' country notes in payment of cattle, sold at a fair fourteen miles distant, on the Friday afternoon, and his master not being at home on his return he did not settle his accounts until the Saturday evening, the bankers having stopped payment in the middle of the day.

The Court held, that the plaintiff was not fixed with the loss by neglecting to present them on the Saturday.

ROGERS v. LANGFORD, E. T. 1833. Ex. 1 C. & M. 637; S. C. 3 Tyrw. 654.

though it should be presented for payment without delay.

THE plaintiff paid the defendant for goods, in five country notes, on the 23rd, and on the 28th the defendant brought them to the plaintiff's shopman for change, which he received, neither party knowing that the bank stopped payment on that day; the plaintiff was informed of it on the night of the 29th, and on the 30th wrote to the defendant, informing him of the stoppage and desiring him to exchange the notes; and, no reply having been received, the plaintiff, on the 6th of the following month, tendered the notes to the defendant, but he refused to accept them. It appeared, also, that the notes were never presented at the bank.

The Court held, that the plaintiff, as the holder, was bound to have presented them to the bank for payment, or else to have returned them, without delay, to the defendant.

2. *When payable at Sight.*

DIXON v. NUTTALL, T. T. 1834. Ex. 1 C., M. & R. 307; S. C. 4 Tyrw. 1013; S. C. 6 C. & P. 320.

There must be a presentment where the note is payable "at sight."

"I PROMISE to pay Mary Ann Dixon, or bearer, on demand, the sum of 16*l.* at sight, by giving up clothes and papers, &c. N. Nuttall." In an action on the note, the declaration contained an averment that the defendant had sight of the note. It appeared that, at the time the note was taken, certain clothes were given up; but no evidence was adduced that the note was ever presented, or that the defendant ever saw it after it was made.

Per Cur.—The rule applicable to the construction of notes is, that you are not to reject words when you can give them a meaning and a sense. Now, we can give a meaning to the expression "at sight," which is, that before the defendant is called upon to pay the note he must see it. The meaning is, that the maker is not to be called upon to pay till the note has been presented to him. No presentment was here proved, and therefore the plaintiff is not entitled to recover.

3. *When paid for Honour.*

By 6 & 7 Will. 4, c. 58, "Whereas bills of exchange are occasionally accepted supra protest for honour, or have a reference thereon in case of need; and whereas doubts have arisen when bills have been protested for want of payment, as to the day on which it is requisite that they should be presented for payment to the acceptors or acceptor for honour, or to the referees or referee; and it is expedient that such doubts should be removed: Be it therefore declared and enacted, that it shall not be necessary to present such bills of exchange to such acceptors or acceptor for honour, or to such referees or referee, until the day following the day on which such bills of exchange shall become due; and that, if the place of address on such bill of exchange of such acceptors or acceptor for honour, or of such referees or referee, shall be in any city, town, or place, other than in the city, town, or place where such bill shall be therein made payable, then it shall not be necessary to forward such bill of exchange for presentment for payment to such acceptors or acceptor for honour, or referees or referee, until the day following the day on which such bill of exchange shall become due."

The 6 & 7 Will. 4, allows presentment to acceptor for honour to be the day after the bill becomes due;

By sect. 2, it is enacted, "That, if the day following the day on which such bill of exchange shall become due shall happen to be a Sunday, Good Friday, or Christmas-day, or a day appointed by his Majesty's proclamation for solemn fast or of thanksgiving, then it shall not be necessary that such bill of exchange shall be presented for payment, or be forwarded for such presentment for payment to such acceptors or acceptor for honour, or referees or referee, until the day following such Sunday, Good Friday, Christmas-day, or solemn fast or thanksgiving."

and if that be Sunday or Good Friday, &c., then the following day.

(b) WITH REFERENCE TO THE PRESENTMENT OF A BILL OR NOTE.

1. *At what Place to be made*.*

DE BERGARECHE *v.* PILLIN, E. T. 1826. C. P. 3 *Bing.* 476; S. C. 11 *Moore*, 350.

In an action by the indorsee against the drawer of a bill of exchange, the plaintiff averred, in his declaration, that the bill was accepted by J. S., payable at Messrs. Sikes & Co.'s; and that, when it became due, it was duly presented there for payment; but that neither Messrs. Sikes nor J. S. would pay the same, but wholly refused so to do. On special demurrer, assigning for causes, that it did not appear in the declaration, that the words "not elsewhere" were contained in the acceptance, and that due presentment of the bills to J. S. should have been alleged—

Under a general acceptance, the acceptor may be called on at the place stated in the bill or elsewhere, but the holder is only bound to present at the former.

* The consequence of not duly presenting a bill or note is, that all the antecedent parties are discharged from their liability, whether on the instrument, or on the consideration for which it was given. The acceptor or maker, however, still continues liable; and, indeed, presentment is not in general necessary for the purpose of charging him; the action itself being held to be a sufficient demand. (*Rumball v. Bull*, 10 Mod. 38; *Frampton v. Coulson*, 1 Wils. 33; *Norton v. Ellam*, 2 M. & W. 461).

Per Cur.—It has been admitted, as the acceptance must be taken to be a general acceptance, that the statute 1 & 2 Geo. 4, c. 78, does not affect the present question; but it has been contended, that it was necessary to aver in a declaration against the drawer, that the bill had been presented to the acceptor himself, although he had made it payable at his bankers. The statute in terms has the effect of declaring, that, when a person makes a bill payable at his bankers', or a particular place, he means no such thing; but that the holder may treat it as a general acceptance. But the Legislature has not said, that, if a person accepts a bill payable at his bankers', the holder is obliged to present it any where else. But, independently of the statute, there can be no doubt but that, if the acceptor of a bill makes it payable at a particular place, the holder is only required to present it there, and not seek the acceptor elsewhere. It has been contended, however, that it should have been averred, that the defendant had not been found at Messrs. Sikes & Co.'s, or that he was not there in order to pay. But that appears to be an absurdity; for the holder did not expect to find the acceptor at his bankers', but his money; and the bankers might be considered as his agents to pay the bill on his behalf. Here it is averred, that the bill was accepted, payable at Messrs. Sikes & Co.'s; and that the holder applied there for payment, which was refused; and as he expected the money there, and they were authorized to pay, we are of opinion, that the plaintiff has averred all he ought to have done in order to entitle him to recover as against the defendant.—Judgment for the plaintiff.

FAYLE *v.* BIRD, E. T. 1827. K. B. 6 B. & C. 531; S. C. 2 C. & P. 303.

A place of payment, stated in the body of a bill,

DECLARATION against the acceptor of a bill of exchange, in which the drawer, in the body of the bill, had required payment at a particular place. There was no averment of such a presentment—

The Court said, they had conferred with the Judges of the Common Pleas, and concurred in the decision of the question in the case of *Selby v. Eden*, (3 Bing. 611; S. C. 11 Moore, 500); where, in an action by the indorsee against the acceptor of a bill of exchange, payable to the order of the drawer in London, the declaration stated, that the defendant accepted it at London, whereby he became liable to pay. The Court held the declaration sufficient.

WILLIAMS *v.* WARING, M. T. 1829. K. B. 5 M. & R. 9; S. C. 10 B. & C. 2.

or at the foot of the note, does not render a presentment there necessary to charge the acceptor or maker.

A NOTE appeared to have the following memorandum:—"At Messrs. B. & Co., Barbican, London." The whole of the note and memorandum were written by the defendant at the same time. It was contended, that this was a variance, and that the declaration should have described the note as payable at the place mentioned in the memorandum. The learned Judge overruled the objection.

And the Court concurred with him.

GIBB v. MATHER, H. T. 1832. Ex. 2 C. & J. 254; S. C. 2 Tyrw. 189; S. C. 8 Bing. 214; S. C. 1 M. & Scott, 387.

IN an action upon a bill of exchange, it appeared that the bill was drawn payable "to my order in London," and addressed to Messrs. F. & Co., Liverpool, with the words, "payable in London," added, and was accepted by the latter "at Messrs. J. & Co.'s, bankers, London;" but it was presented to the acceptors at Liverpool, who refused payment; of which due notice was given to the defendant, the drawer.

Per Cur.—Before the passing of the stat. 1 & 2 Geo. 4, c. 78, it was a subject of considerable doubt in the Courts of Law, whether, in the case of a bill drawn generally, but accepted, payable specially at a particular place, an action could be maintained against the acceptor, without averring in the declaration, and proving at the trial, a presentment for payment at the place where the drawer had, by his acceptance, made the bill payable. But the doubt which had been formed, was confined to the case where the question arose between the holder and the acceptor. In cases between the indorsee and the drawer, upon a special acceptance by the drawer, no doubt appears to have existed but that a presentment at the place specially designated in the acceptance was necessary, in order to make the drawer liable, upon the dishonour of the bill by the acceptor. Such, then, being the state of the drawer's liability at the time the statute was passed, it must still remain the same, unless that statute has made an alteration therein. But it appears to us, that the statute neither intended to alter, nor has it in any manner altered the liability of drawers of bills of exchange; but that it is confined in its operation to the case of the acceptors alone. The title of the act is, "An Act to regulate Acceptances of Bills of Exchange;" and, after reciting that it has been adjudged, that, where a bill is accepted payable at a banker's, the acceptance thereof is not a general, but a qualified, acceptance, but a general practice and understanding had prevailed amongst merchants that such acceptance was a general acceptance, it proceeds to enact, that, after the passing of that act, such an acceptance shall be deemed and taken to be to all intents and purposes a general acceptance of such bill, unless the acceptance is restricted to payment at the particular place, by the words and in the manner directed in the act. The very reference in the statute to the adjudication by law, imports that the Legislature intended the statute to apply to those cases only in which doubts had previously existed, and which had been adjudged in law; not to cases like the present, which were free from doubt at the time of passing the act.

For the 1 & 2 Geo. 4, only applies to acceptors, and not drawers; hence it must be presented where payable, to charge the drawer.

HINE v. ALLELY, E. T. 1833. K. B. 1 N. & M. 433; S. C. 4 B. & Ad. 624.

INDORSEE against drawer of a bill of exchange. It appeared, that the holder of a bill carried it, when due, to the residence of the acceptor stated in the bill, found the house closed, and inquired for the acceptor in the neighbourhood, but could not hear of him.

Per Cur.—The bill was dishonoured as soon as the indorsee went to the house at which it was made payable and found it closed. This is a sufficient presentment.

Presentment at the house of the acceptor, though closed, he having left, is sufficient to charge the drawer.

2. *To whom to be made.*

BUXTON v. JONES, E. T. 1840. C. P. 1 M. & G. 83; S. C.
1 Scott, N. S. 10.

A bill was presented at the house where payable. A female, in the passage, said that the party was gone:—Held, that the jury might infer, that the female was an inmate, and the presentment was sufficient.

INDORSEE against indorser. The witness had made inquiries at the house where the bill was made payable, and seeing a woman with a child coming out, he, without asking her name, questioned her as to whether Hepworth, the acceptor, lived there, and she in answer said he did, but he had left; upon this, without any further investigation as to her connexion with the house, he left a paper containing the ordinary notice. The parties who kept the house also said that the acceptor lived there, but had gone away to join the police, leaving them his address. They also stated, that they had been at home the greater part of the day in question, but had heard nothing of the presentment of the bill. The case was left to the jury upon this evidence, and a verdict passed for the plaintiff.

Per Cur.—This is the case of a bill of exchange drawn in particular specific terms, and directed to be presented and paid at a certain house. The acceptance does not introduce any variance whatever, and, consequently, it must be taken to be accepted in the terms in which it was drawn. When due, it was presented at the house; and the party who presented it stated, that he asked a person who came from the house, and who, from the evidence, must be taken to have been an inmate, whether the acceptor resided there, and he received from her an answer which was also found to be true. Now, on an issue raised upon the fact of presentment to the acceptor, it need not be shewn that the presentment was made to the acceptor personally; an averment of presentment to the acceptor is supported by proof, that the holder went to the house at which the bill was directed to be presented, and found it empty.

See Hine v. Allely, 4 B. & Ad. 624; S. C. 1 N. & M. 433; *ante*, 297.

3. *At what Time of Day to be made.*

WILKINS v. JADIS, E. T. 1831. K. B. 2 B. & Ad. 188; S. C.
2 M. & Rob. 41.

Presentment of a bill, except at a banker's, may be at a reasonable time; hence, seven or eight o'clock in the evening is not unreasonable*;

IN an action by indorsee against drawer, the question was, whether the bill had been presented in due time, so as to charge the defendant, the drawer. The bill was accepted payable at No. 15, Coleman Street, Doctors' Commons. On the day of its becoming due, a clerk went to that house between seven and eight o'clock in the evening; the door was locked, he rang the bell, no one answered, and he went away.

Per Cur.—The rule as to hours of presentment, where the bill is payable at a banker's, has been long established by usage. For

* A usage, as between the customer and banker, that the latter shall present cheques at the clearing-house on the same day, if clearly established, does not preclude the general right of the customer to have until the next day to send the cheque in. (*Boddington v. Schleneker*, E. T. 1833, K. B., 1 N. & M. 540; *Abr. post. tit. Check*).

other people there is no definite time. The question is, what is a reasonable hour. We think between seven and eight is not unreasonable.

TRIGGS v. NEWHAM, H. T. 1825. N. P. 1 C. & P. 631.

IN an action against the acceptor of a bill of exchange it appeared, that the defendant was a solicitor, and that the bill had been presented at his office about eight o'clock in the evening, in the middle of the month of February.

Best, C. J.—*Darbyshire v. Parker*, (6 East, 3), does not apply to such a case as this. This case is distinguishable from the case where you are to give notice to the drawer. This is the case of an acceptor, and all that is required is application or presentment at the particular place; and a presentment made at an attorney's office at eight o'clock in the evening is, I think, quite in reasonable time.

or at a solicitor's at eight o'clock at night.

GARNETT v. WOODCOCK, H. T. 1818. K. B. 6 M. & S. 44.

IN an action on a bill of exchange it appeared, that the bill of exchange was presented for payment out of banking hours; it was holden sufficient, it appearing, that there was a person stationed there for the purpose of returning answers, and who said there were *no orders*.

Banking hours make no difference where a person is stationed to give answers.

4. *Where Money is paid into a Banker's after Presentment.*

WHITAKER v. BANK OF ENGLAND, H. T. 1835. Ex. 1 C., M. & R. 744; S. C. 5 Tyrw. 208; S. C. 6 C. & P. 700.

A BILL was presented at the Bank of England at nine in the morning, and remained until eleven, when it was returned with the answer, "no sufficient effects;" and was again presented by the notary at half-past six, when the same answer was given. It appeared, that funds were paid in after eleven o'clock, and notice was sent early the next morning to the holder, that the bill would be paid. In an action for special damages in the loss of a customer in consequence of the dishonour of the bill; upon issues joined, whether the Bank had funds at the time of the presentment, or in reasonable time for the clerks to know it before the return of the bill dishonoured—

A bill must be presented within the hours of business; but it is not the duty of a banker, where money is paid in after presentment, to take up the bill.

The Court held, that a presentment for payment means a presentment within the hours of business, the presentment after not being for the purpose of charging the drawer, but of protesting the bill; and that, upon the question of special damage, the defendants were not bound to pay the bill at that time; and, therefore, were not answerable in damages for not doing so.

5. *What Circumstances dispense with Presentment*.*

TERRY v. PARKER, T. T. 1837. K. B. 1 N. & P. 752; S. C. 6 Ad. & E. 502.

ACTION on a bill of exchange. It had not been presented for

A bill need not

* The bankruptcy or insolvency of the drawee is no excuse for a neglect to present for payment, for many means may remain of obtaining payment by the

be presented, if the drawer had no effects in the hands of the acceptor.

payment. It appeared, that the drawer had no effects in the hands of the acceptor.

Per Cur.—The question in this case is, whether want of effects in the hands of the drawee excuses the holder of a bill of exchange from the necessity of presenting the bill for payment, as well as of giving notice of dishonour to the drawer. Many cases establish that notice of dishonour need not be given to the drawer in such a case; and the reason assigned is, because he is in no respect prejudiced by want of such notice, having no remedy against any other party on the bill. This reason equally applies to want of presentment for payment; since, if the bill were presented and paid by the drawee, the drawer would become indebted to him in the amount, instead of being indebted to the holder of the bill, and would be in no way benefited by such presentment or payment. (*See Prideaux v. Collier*, 2 Stark. 57; *De Bergh v. Atkinson*, 2 Hen. Bla. 336; *Ex parte Bynold*, 1 Deac. 728).

PHILPOTT *v.* BRYANT, M. T. 1827. N. P. 3 C. & P. 244.

And, if the drawee dies, a presentment, where the bill is payable, suffices, though the executors are ignorant of it.

THE bill, in this case, was payable at a particular place. The acceptor died before it became due.

Park, J., held it sufficient in an action against the drawer to prove presentment at the specified place, and it is not necessary to shew presentment at the house of the deceased's representative.

6. *With Reference to the Effect of actual Payment of a Bill or Note.*

HARTLEY *v.* CASE, M. T. 1825. N. P. 1 C. & P. 556.

The acceptor has the whole day to make the payment.

ON the presentment of the bill on the day on which it became due, the answer was, that they had no effects, but probably should have in the course of the day.

And *Abbott, C. J.*, held, that the acceptor had the whole of the day when the bill became due to pay it in.

HANSARD *v.* ROBINSON, T. T. 1827. K. B. 7 B. & C. 90; S. C. 9 D. & R. 860; S. C. M. & Rob. 404, n.

The party making the payment is entitled to the bill.

THIS was an action against the acceptor of a bill of exchange, which the plaintiff had lost after it became due and had been dishonoured, and which he therefore could not produce on the trial.

assistance of friends or otherwise. (*Russell v. Langstaffe*, Doug. 515; see *Esdaile v. Sowerby*, 11 East, 114; *Lafitte v. Slatler*, 6 Bing. 623; *Bayley*, 252; *Bowes v. Horne*, 5 Taunt. 30; *Rogers v. Langford*, 1 Crompt. & Mees. 639; *Camidge v. Allenby*, 6 B. & C. 373; *Henderson v. Appleton*, 3 Tyr. 660). It has been held in the King's Bench, that the shutting up of a bank when any demand there made would have been inaudible, is substantially a refusal by the bankers to pay their notes to all the world; (*Howe v. Bowes*, 16 East, 112); but it was decided in the same case, on error, in the Exchequer Chamber, that an allegation in the declaration that the makers became insolvent, and ceased and wholly declined and refused then and thenceforth to pay at the place specified any of their notes, is insufficient, not being an allegation of presentment. (5 Taunt. 30). But, it is conceived, notwithstanding the observations of the Court in the last case, that it cannot be necessary for the holders of the notes of a bank which has notoriously stopped payment, to go through the empty form of carrying their notes up to the bank doors and then carrying them home again.

He had offered an indemnity which had been refused, and he wished the jury to infer from the evidence that the bill had been destroyed, but they were not satisfied of this, and consequently, for aught that appeared to the contrary, the bill might be outstanding in other hands. The plaintiff was thereupon nonsuited.

Per Cur.—The meaning of an acceptance of a bill of exchange must be taken to be, that the acceptor will pay the amount upon the bill being delivered up to him; and if the bill be not delivered up to him he may retract his offer. It is due to the acceptor that this should be so, for how is he to be satisfied of the alleged loss of the bill; and, if it should be found, and produced against him, why should he be subject to the inconvenience of proving all these circumstances? Can the holder by his own negligence or misfortune cast such a responsibility upon the acceptor? We think he cannot. He has his remedy however, for equity will assist him.

HUBBARD *v.* JACKSON, M. T. 1827. C. P. 4 *Bing.* 390; S. C. 1 *M. & P.* 11; S. C. 3 *C. & P.* 134.

THE drawer of a bill payable to his own order, indorsed it to J. W., who, on its being dishonoured by the acceptor, sued and recovered the amount from the drawer, and the latter afterwards indorsed it to the plaintiff.

The Court held, that a drawer who has paid a dishonoured bill, may at any time after, instead of suing the acceptor, put it again into circulation upon his own indorsement only, and each indorsee may sue upon it.

As a drawer, who has paid a dishonoured bill, may at any time after put it into circulation.

7. *With reference to refunding after Payment of a Bill or Note.*

DAVIES *v.* WATSON, T. T. 1833. K. B. 2 *N. & M.* 709.

A CREDITOR drew upon his debtor, and by anticipation wrote the acceptance across, (leaving a blank for the name of the debtor), making the bill payable at the house of a friend of the debtor, but without any previous authority from that friend. The bill was accepted by the debtor, negotiated by the creditor, and, on its becoming due, was presented by the holder at the friend's house; he mistaking it for another bill paid it. In an action to recover back the money so paid by mistake—

The Court held it could not be maintained, as the plaintiff had the means of knowing all the facts, and no fraud having been practised on him.

See Smith v. Mercer, 6 *Taunt.* 76; and *post*, *tit.* "Money had and received."

The payment of a wrong bill by mistake cannot be recovered back.

XIX. RELATIVE TO THE NOTICE OF DISHONOUR OF A BILL OR NOTE.

(a) WHEN REQUISITE, AND WHAT CIRCUMSTANCES DISPENSE WITH GIVING.

LAFITTE *v.* SLATTER, T. T. 1830. C. P. 6 *Bing.* 623; S. C. 4 *M. & P.* 457.—S. P. GOODMAN *v.* HARVEY, E. T. 1836. K. B. S. C. 6 *N. & M.* 372; S. C. 4 *Ad. & E.* 870.

ONE T., at the instance of one R., (who was indebted to the defendant), accepted a bill drawn on him by the defendant, having no assets in his hands belonging to the defendant.

Notice must be given to the drawer in all

cases where he has reason to believe he will not be called on to pay.

The Court said, the general rule is, that the drawer of a bill of exchange is at all times entitled to notice of its dishonour. The case of *Bickerdikey v. Bollman*, (1 T. R. 406), forms an exception to this rule, which the Courts have always lamented when it has been brought before them. Where a bill is accepted for the accommodation of the drawer himself, he has no right to expect it to be paid by the acceptor, and, consequently, he is not entitled to notice; but, where he has a reasonable expectation that the acceptor or another person will pay the bill, he is entitled to notice.

SPoonER v. GARDINER, E. T. 1824. N. P. 1 R. & M. 84.

So, the drawer of an accommodation bill, who has given the acceptor his acceptances, on which the latter has raised money, is entitled to notice of dishonour.

The drawer of a bill of exchange had no effects in the hands of the acceptor from the time of drawing the bill till it became due; but the acceptor had received from the drawer, prior to this bill on which the action was brought, acceptances of the drawer, upon which he had raised money; some of which acceptances had been returned dishonoured, and others were outstanding.

Best, C. J., held, that the plaintiff, the indorsee, was not relieved from the necessity of proving notice of the dishonour. The principle on which notice is dispensed with is, that a fraud has been committed in drawing on a person with whom the drawer had no effects.

SHARP v. BAILEY, H. T. 1829. K. B. 9 B. & C. 44.

Where a drawer makes a bill payable at his own house, it is for the jury to say whether he is entitled to notice of dishonour.

INDORSEE against the drawer of a bill of exchange, accepted by one Askew, payable to the drawer or order, and by him indorsed to the plaintiff. It appeared that the bill, which was in the handwriting of the defendant, was made payable at his own house. No evidence was given of any notice to the drawer that the bill had been dishonoured, and it was thereupon objected, that the plaintiff could not recover.

The Judge thought that the circumstance of the defendant's having drawn the bill payable at his own house, was evidence of its being an accommodation acceptance, in which case notice of dishonour was unnecessary; and he left that question to the jury, who found for the plaintiff. And the Court refused to interfere.

VAN WART v. WOOLLEY, M. T. 1824, K. B. 3 B. & C. 439; S. C. 5 D. & R. 374; S. C. M. & M. 520.—S. P. TERRY v. PARKER, T. T. 1837. K. B. 1 N. & P. 752.

But a drawer who, at the time of the drawing or since, has had no funds in the drawee's hands,

J. & Co., residing in America, employed the plaintiff, residing at Birmingham, to purchase goods for them, and had sent him a bill drawn by C. in America on persons in London, (but J. & Co. had not indorsed it), which he delivered to the defendants, his bankers at Birmingham, who sent it to L. & Co., bankers in London, to present for acceptance; acceptance having been refused, L. & Co. omitted to give notice of such refusal until presentment and refusal to pay. Before the bill reached this country C. became bankrupt, and had not, at the time of the bill being drawn, nor at any time after, any funds in the hands of the drawee. In an action against the defendants' bankers, for omitting to give notice of the non-acceptance for damage sustained by the loss of remedy, 1st, against those from whom he received the bill, and 2ndly, from the drawer—

The Court held, that, as between J. & Co. and the plaintiff, he had not made the bill his own, and might not, notwithstanding the want of notice of non-acceptance, have recovered from them the amount in an action for money paid; and that, as against the drawer, the latter was not entitled to notice.

FRANCE *v.* LUCY, M. T. 1825. N. P. 1 R. & M. 341.

THE notice of dishonour being insufficient, it was proved, that, from the state of the defendant's dealings with the drawers of the bill, who were the defendant's bankers, he could have no reasonable expectation that the bill would be paid by them; when—

Best, C. J., said, that if the jury were of that opinion, the defendant was not entitled to notice of the non-payment. Verdict for the plaintiff.

See Claridge v. Dalton, 4 M. & S. 226.

or who has no reasonable expectation that the bill will be paid, is not entitled to notice.

NORTON *v.* PICKERING, M. T. 1828. K. B. 8 B. & C. 610.

ACTION by indorsee against drawer of a bill of exchange. The plaintiff could not prove notice to the defendant that the bill had been dishonoured by the acceptor; but he sought to dispense with this by shewing that the defendant had no effects in the hands of the acceptor. For want of proof of notice the plaintiff was nonsuited.

Lord Tenterden, C. J.—We think the decision in *Cory v. Scott* (3 B. & Al. 619), is right; and we think that it is better to observe the law of merchants in all cases; and to lay down that the party who holds the bill is bound, in all cases, to give notice to the other parties of the default by the acceptor. At least, speaking with deference for those decisions which preceded *Cory v. Scott*, we think it is questionable whether it is not better that it should be so. The plaintiff here seeks to go into matters *dehors* the bill. He says—“You had no effects in the hands of the acceptor.” The defendant, we think, may answer—“It does not follow that I am to pay. You took the bill upon the compact that you should present it to the acceptor. You have no right to calculate whether he would or would not pay. Present in the usual course. If the acceptor pay not, give me notice, and I then become liable.” The drawer may have arrangements with other parties, which may be deranged by his not having notice, although he may have no effects of his own in the hands of the acceptor.

That rule, however, is not universal.

CUNDY *v.* MARRIOTT, M. T. 1831. K. B. 1 B. & Ad. 696.

INDORSEE against indorser of a bill of exchange. The action, in substance, was for the balance of goods sold and delivered. The amount was not in dispute. In payment, the defendant gave the bill of exchange declared upon in part, and paid the balance upon which a receipt was given to him. The bill was not paid by the acceptor, but the defendant did not receive the usual notice of the dishonour; and he, therefore, contended he was discharged. But it

Where the bill was not properly stamped:—Held, that an indorser was not entitled to notice of dishonour*.

* Nor is the indorser of a note not negotiable. (*Plimley v. Westly*, 2 Bing. N. S. 249).

turning out that the bill was upon a wrong stamp, the question was, whether this circumstance dispensed with notice. Lord *Tenterden* was of opinion that it did.

And the Court concurred, observing—How can it be said that the indorser was entitled to notice of dishonour of a bill which was not available in his hands, or in those of any other person? The reason which renders notice in general necessary entirely fails in this case, as here the defendant would have no remedy over against any other party upon the bill.

ROHDE *v.* PROCTOR, T. T. 1825. K. B. 4 B. & C. 517; S. C. 6 D. & R. 610.

Assignees of a bankrupt are entitled to notice of dishonour of a bill, the bankrupt being drawer*.

THE drawer of certain bills having absconded, became bankrupt before they were due, and never surrendered to his commission. His house was kept open, in the possession of the messenger, till after the bills became due. While they were running, the holder knew that two persons were appointed assignees of the drawer. The acceptor also became bankrupt before the bills became due. The holder never gave or attempted to give notice of the dishonour of the bills to the drawer or his assignees.

Per Cur.—The assignees were entitled to notice. On the dishonour of a bill, the holder must use due diligence to give notice to such of the parties as would have a remedy over upon it, in case they took it up, or he will make it his own as against them, and lose his remedy on the bill against them by neglecting to use such diligence.

PICKIN *v.* GRAHAM, T. T. 1833. Ex. 1 C. & M. 725.

Before bill returned, a statement—"I suppose there will be no alternative but my taking up the bill; and if you will bring it me on Tuesday, I will pay the money,"—does not dispense with notice of dishonour.

INDORSER against drawers of a bill. To dispense with notice of dishonour, it was proved that the day after the bill of exchange had been dishonoured in London, and before the fact of the dishonour could be known in Yorkshire, the drawer's clerk called in Yorkshire upon the indorser prior to the holder. A conversation took place as to the bill being likely to come back, and the clerk said—"I suppose there will be no alternative but my taking up the bill, and if you will bring it to Sheffield on Tuesday I will pay the money." The indorser did not receive either the bill or notice until some days after the Tuesday; and notice of dishonour was not given to the drawer in due time.

Per Cur.—It is clear that the party had not the bill at the time of the conversation, and the promise was manifestly confined to the case of the bill coming back to him in due course. He says—"I have no alternative, and I suppose I must pay it." It appears to us to amount only to this:—"If the bill comes back to you in due course, I know my liabilities and I must pay it." In *Prideaux v. Collier*, (2 Starkie, N. P. C. 57), the holder applied to the drawer, who said that he had no effects, but that the bill would not be due until the next day, and that effects would probably be provided before that time. On the next day, when the bill became due, the

* Where bills fell due after the bankruptcy, some before and some after the messenger entered, but all whilst part of the family remained in the bankrupt's house:—Held, that notice of dishonour ought to be left there; and, in all cases, due diligence used by the holder to give notice, and, if in possession, to the messenger. (*Ex parte Johnston*, 1 M. & A. 622).

defendant (the drawer) told the plaintiff that he hoped the bill would be paid; that he would see what he could do, and would endeavour to provide effects. The bill was not presented until the day after it was due; and Lord *Ellenborough* held, that the drawer was discharged for want of notice.

(b) WITHIN WHAT TIME TO BE GIVEN.

HINE v. ALLEY, E. T. 1833. K. B. 1 N. & M. 433; S. C. 4 B. & Ad. 624.

THE plaintiff sent the bill when due to the residence of the acceptor stated in the bill, found the house closed, and inquired for the acceptor in the neighbourhood, but could not hear of him. Notice of dishonour was given the same day.

Notice may be given the day the bill falls due, if the house be shut up and no person there.

Per Cur.—It is true that the case of *Burbridge v. Manners*, (3 Camp. 193), has decided that, as soon as the acceptor refuses to pay the bill on the day on which it becomes due, it is dishonoured; but in this case the bill was not presented in such a way as that payment could be refused. The bill was dishonoured as soon as the indorsee went to the house at which it was made payable and found it closed.

DOBREE v. EASTWOOD, M. T. 1827. N. P. 3 C. & P. 250.

THE question in this case was, whether the holder of a bill had not as many days as there were indorsers to give notice.

Per Burrough, J.—If there are several indorsers of a bill, and the last indorsee and holder resorts in the first instance to the first of such indorsers, he is not entitled to as many days as there are indorsers to give notice of dishonour in, but must give it within the same time as he would have been obliged to do it in, if he had resorted at first to his own immediate indorser. But each indorser has his own day.

The holder has not as many days to give notice as there are indorsees, but each indorser has his own day.

HARTLEY v. CASE, M. T. 1825. N. P. 1 C. & P. 555; S. C. 4 B. & C. 339; S. C. 6 D. & R. 505.

NOTICE of dishonour was given the day the bill became payable; but it did not state explicitly the fact that it had been dishonoured, and the answer at the place where payable was, "no effects, but they probably should have in the course of the day."

Abbott, C. J.—I think the notice of dishonour was insufficient; it ought to explicitly tell the party that the bill has been dishonoured, as a fact, and not leave it to be made out as matter of inference, the acceptor having the whole day to pay it in, unless payment be positively refused.

To make a notice of dishonour the day the bill is payable good, there must have been a positive refusal.

And of that opinion were the Court.

GEILL v. JEREMY, E. T. 1827. N. P. 1 M. & M. 61.

THE plaintiff, who lived near Chorley, in Lancashire, received notice of the dishonour by the post, at nine o'clock in the morning of Thursday, August 31. The post left the village where he resided at six that evening, and the mail bags were not made up at Chorley

Notice should be sent by next post on the following day after dishonour*.

* Notice of dishonour of bills payable on the day preceding Good Friday or Christmas-day may be given the day after those days; and where bills become

(two miles off) till nine in the evening. The plaintiff did not write by that post, which would have arrived in London, to which his letter was to be addressed, on Saturday; and there being no post to London on the Friday, he did not write till the Saturday.

Lord *Tenterden*, C. J.—The general rule is, that the party need not write on the very day that he receives the notice. If there be no post on the following day, it makes no difference; the next post after the day on which he receives the notice is soon enough.—Verdict for the plaintiff.

HAWKES v. SALTER, E. T. 1828. C. P. 4 *Bing.* 715; S. C. 1 *M. & P.* 750.

Where a country bill was dishonoured on Saturday, the post left at half past nine in the morning:—Held a notice sent on Tuesday was in time.

A BILL of exchange accepted, payable at a banker's at N., became due, and was presented for payment there on a Saturday, and dishonoured. The post from N. to the place where the drawer resided left N. at half-past nine in the morning.

Per Cur.—Notice of dishonour would clearly have been sufficiently early if sent by the Tuesday morning's post; but there was no satisfactory evidence that any notice had been so sent. It would, however be unfair to nonsuit the plaintiff on that ground, and as he may be enabled on a future occasion to prove that the letter was actually put into the box, we must grant a new trial.

FIRTH v. THRUSH, T. T. 1828. K. B. 8 *B. & C.* 387; S. C. 2 *M. & R.* 359.

If an indorser's address be not known, after its discovery the holder has a day to give him notice;

A BILL was drawn at Frome, indorsed by the defendant, whose address was not known, and the holder took the chance in August, when the bill became due, of writing to the defendant at Frome, where the drawer lived; and on the 16th of October, (inquiries being made in the interim), the plaintiff's attorney found out the address, saw the plaintiff, and received his instructions on the 17th, and wrote on the 18th.

The Court held—first, where the plaintiff has not given regular notice of the dishonour of a bill, but has given such a notice as is sufficient in point of law, he may declare generally with the common averment of notice, and need not state the special circumstances;—and, secondly, that, as he had a right to take a day to communicate it to his client, notice on the following day was sufficient.

HARRIS v. RICHARDSON, H. T. 1831. N. P. 4 *C. & P.* 522.

but due diligence must be shewn.

IN an action on a bill of exchange, the declaration alleged that notice of dishonour was given to the defendant. It appeared that inquiry had been made at the previous place of the defendant's residence, which he had left before the bill became due, and no notice was given at all.

The Court held it insufficient, and said, if notice be in fact given before action brought, although not at the proper time, yet proof of having used diligence will satisfy the allegation of notice being given.

due on any day appointed for public fast or thanksgiving payment shall become due and may be noted the day preceding, and notice given after such fast or thanksgiving day; and where such shall be appointed on a Monday, notice of dishonour of bills payable on the preceding Saturday, may be given on the Tuesday. (7 & 8 Geo. 4, c. 15).

DOBREE v. EASTWOOD, M. T. 1827. N. P. 3 C. & P. 250.

THE notice was put into the twopenny post before such an hour of the day when the notice was required to be given, but it was not delivered in due time according to the rules at the Post-Office.

Burrough, J., held, that, if a letter, giving notice of the dishonour of a bill, is put into the twopenny post-office in time to be delivered on the proper day, in the ordinary course of business, but, from some delay in the office, does not reach its destination till afterwards, such delay in the office will not prejudice the party by whom the notice was given.

The delay in the Post-Office as to the delivery of a letter does not prejudice the holder of the bill as to notice*.

KERBY v. ENGLAND, T. T. 1826. N. P. 2 C. & P. 300.

A LETTER, giving notice of the dishonour of a bill, stated, "I did not know until within *these few days* where you were to be found." It was submitted, that due diligence had not been used in giving him notice. The letter was an admission, that his address had been known for *several days* before; and a notice ought to be given on the very next day after a party is discovered.

Abbott, C. J.—For ought I can tell, "within these few days" may mean the previous day. I cannot say that it does not.

A statement in a notice "I did not know your address till within *these few days*:"—Held, not to mean *several days*, and therefore in time.

(c) FORM OF THE NOTICE.

1. *When in Writing.*

HARTLEY v. CASE, T. T. 1825. K. B. 4 B. & C. 339; S. C. 6 D. & R. 505; S. C. 1 C. & P. 556.

IN an action by indorsee against drawer, the notice of dishonour was as follows:—"I am desired to apply to you for the payment of the sum of 150*l.*, due to myself on a draft drawn by A. B. on C. D., which I hope you will on receipt discharge, to prevent the necessity of law proceedings, which will otherwise immediately take place."

Per Cur.—No precise form of words is necessary to be used in giving notice of dishonour of a bill of exchange, but such a notice must contain definite information what the bill is, by whom and when drawn, on what day it was due, and that it was presented and dishonoured; or it is insufficient.

A notice of dishonour should state by whom and when the bill was drawn, on what day it was due, that it was presented and refused.†

SOLARTE v. PALMER, E. T. 1834. C. P. 1 *Bing. N. S.* 194; S. C. 1 *Scott*, 1; S. C. 7 *Bing.* 530; S. C. 5 *M. & P.* 475; S. C. 1 C. & J. 417.

THE attorney for the indorsee wrote a letter to the indorser to the following effect:—"A bill for 683*l.*, drawn by K. on J. & Co., and bearing your indorsement, has been put into our hands by A., with directions to take legal measures for the recovery thereof, unless immediately paid to us."

The Court held, that this letter was not a sufficient notice of dis-

The dishonour must be distinctly stated;

* So, if through misdirection the notice of dishonour arrives too late, (*Siggers v. Brown*, H. T. 1836, N. P., 1 M. & Rob. 520), or where it is improperly addressed, through the drawer's bad hand-writing, it is a question for the jury, whether in time or not. (*Hewitt v. Thomson*, T. T. 1836, N. P., 1 M. & Rob. 543).

† This and the following cases were all reviewed and commented upon in *Furze v. Sharwood* in Michaelmas Term, 1841, and the principle involved in them upheld.

honour. "The notice of dishonour," says *Tindal*, C. J., delivering the judgment of the Court of Exchequer Chamber, "which is commonly substituted in this country in the place of a formal protest (such formal protest being essential in other countries to enable the plaintiff to recover,) most certainly does not require all the precision and formality, which accompanied the regular protest for which it has been substituted. But it should, at least, inform the party to whom it is addressed, either in express terms or by necessary implication, that the bill has been dishonoured, and that the holder looks to him for payment of the amount.

See Hartley v. Case, 7 Bing. 530; *Boulton v. Welch*, 3 Bing. 688; but see *Hedger v. Stevenson*, 2 M. & W. 799; *Housego v. Cowne*, 2 M. & W. 384; *Woodthorpe v. Lawes*, 2 M. & W. 109.

COOK v. FRENCH, E. T. 1840. K. B. 10 Ad. & E. 131; S. C. 3 P. & D. 596.

and, either in terms or in words, that the bill is due.*

THE plaintiff, indorsee of a bill of exchange, sent the following letter to the defendant, the drawer:—"I beg to inform you, that Mr. Duterrain's acceptance for 200*l.*, drawn and indorsed by you, due July 31, has been presented for payment and returned, and now remains unpaid. It was contended, upon the authority of *Hedger v. Stevenson*, (1 Nev. & P. 799; S. C. 5 D. P. C. 771); and *Burgh v. Legge*, (5 M. & W. 418; S. C. 7 D. P. C. 814), that there was no sufficient notice to the drawer, because it did not shew that the bill was due.

Lord Denman, C. J., said, that the Court had considered the point, and were of opinion that the notice was perfectly sufficient, because it appears in terms that the bill is due.

MESSENGER v. SOUTHY, E. T. 1840. C. P. 1 M. & Gr. 76; S. C. 1 Scott, N. S. 180; S. C. 8 D. P. C. 594.

A notice, "this is to inform you that the bill I took of you £— is not took up, and the money I must pay immediately," is not sufficient;

IN an action by the indorsee against the indorser of a promissory note, notice of dishonour by the maker in the following words:—"This is to inform you, that the bill I took of you 15*l.* 2*s.* 6*d.* is not took up, and 4*s.* 6*d.* expense, and the money I must pay immediately, my son will be in London on Friday morning." A verdict was found for the plaintiff. On motion to nonsuit the plaintiff—

Per Cur.—The short question in this case is, whether the notice of dishonour of the promissory note on which this action is brought, is sufficient, under the authority of the law laid down by the House of Lords in the case of *Solarte v. Palmer*, (ante, p. 307). The law laid down by the House of Lords has not been, as indeed it could not be in an inferior court of law, called in question upon the argument of this case. The notice is clearly insufficient.

LEWIS v. GOMPERTZ, E. T. 1840. Ex. 6 M. & W. 399.

but "that the bill for £—, drawn by A.

A BILL of exchange having been presented for payment to the acceptor and dishonoured, the holder, as indorsee, wrote on the following day to the next immediate indorser:—"6, Bernard Street,

* Hence, "I have received a notice from the bank that your draft is dishonoured, and I have requested them to proceed on the same," is a sufficient notice. (*Skelton v. Braithwaite*, H. T. 1841, Ex., 7 M. & W. 436).

Russell Square, December 23, 1839. Mr. Gompertz—Sir, the bill of exchange for 250*l.*, drawn by S. Randall on and accepted by Charles Stretton, and bearing your indorsement, has been presented for payment to acceptor thereof and returned dishonoured, and now is overdue and unpaid with me as above, of which I hereby give you notice.”

and accepted by B., has been presented and dishonoured, and is overdue and unpaid,”

Per Cur.—We had some doubt whether it appeared by necessary inference from this letter, that the plaintiff intended to hold the defendant responsible for the amount of the bill. When, however, he says, “it now lies overdue and unpaid with me as above,” viz. 6, Bernard Street, Russell Square, we cannot fail to understand his meaning to be, that the defendant was to come to 6, Bernard Street, to take up the bill. We think, therefore, that, according to our construction of the words “necessary implication,” this letter constitutes a good notice. If we were to put on those words a strict and purely technical construction, no merchant or other person would be safe in giving a notice of dishonour, without having the form of notice adapted to the case of each individual bill as it presented itself, which would operate as a serious prejudice to the mercantile world.

GRUGEON *v.* SMITH, T. T. 1838. K. B. 6 *A. & E.* 499; S. C. 2 *N. & P.* 303.

UPON the dishonour, the clerk of the plaintiff, the indorsee, gave a notice by letter to the drawer, in a printed form, in the terms—“Your bill, drawn on J., and accepted by him, is this day returned, with charges, to which we request your immediate attention.”

or, “with charges to which we request your immediate attention,”

The Court were of opinion that the notice was sufficient.

HEDGER *v.* STEAVENSON, T. T. 1837. K. B. 1 *N. & P.* 799; S. C. 5 *D. P. C.* 771, not S. P.

IN an action by indorsee against indorser of a promissory note, the declaration alleged a promise to pay the note “according to the tenor and effect thereof,” and assigned, as a breach, that the maker did not pay the note, nor did the defendant, or any other person, although the note was duly presented when it became due, whereof the defendant had notice. It appeared that the plaintiff’s attorney addressed a letter to the defendant, informing him that his note, (setting it out), became due the day before, had been returned unpaid, and requested him to remit the amount by return of post, with 1*s.* 6*d.* noting—

or an attorney’s letter, setting out the bill, and stating it was unpaid, and requesting payment and the charge for noting, will do.

The Court held it a sufficient notice of dishonour.

HOULDTCH *v.* CAUTY, E. T. 1838. C. P. 4 *Bing. N. S.* 411; S. C. 6 *Scott*, 209.

To establish the notice of dishonour, it appeared that the holder gave notice, by letter, in these terms—“Messrs. H. are surprised that G.’s bill was returned to the holder unpaid,”—followed by a subsequently communication from the indorsee, expressing his regret, and promising to write to the other parties, by whom or by himself the bill should be paid.

So, the plaintiff writing, “he is surprised A.’s bill was returned unpaid,” is a sufficient notice, if the party expresses his regret, and states that it shall be paid.

Per Cur.—The letter would not have been sufficient, had not the defendant, upon the same day, called upon the plaintiffs at their

counting house; and, in speaking upon the subject of the bill, he said "he was surprised at the conduct of the parties at Edinburgh, and he would write and see the bill paid." Now, observe, the parties were together at the same moment; and who, in such case, can doubt, that, if a sentence denoting dissatisfaction at what had been done at Edinburgh was uttered, such observation would have called forth a recital of all the circumstances? Why, therefore, should the defendant be allowed, by his demeanour upon the occasion, to lull the opposite party into a security fatal to his interests, when, as we said before, the slightest expression of dissatisfaction at what had occurred would have called forth the whole? Besides, the jury found that a notice of dishonour had been given; and we do not feel inclined to disturb the finding.

BOOTH v. JACOBS, E. T. 1834. K. B. 3 N. & M. 351.

Or an equivocal letter, purporting to be an answer to one containing notice of dishonour, may be left to the jury to say whether it contains an admission of the fact of having received due notice or not.

THIS was an action by the indorsees against the drawer of two several bills of exchange. As an admission of notice of dishonour, the following letter was produced:—"Your letter this day came to hand; we were rather surprised at the latter part of your letter, wherein you state you would take proceedings against us. We fully expected that Phillips's bill would have been paid. It will be impossible for me to go out of town to settle our accounts till after Christmas, when we will remit you some cash. Trade is at a stand still in London at present. We have been doing very little business for these last three weeks, as we are determined not to give any more credit, having had such severe losses lately. We have taken up £100 of return bills of Mr. Fenton's, besides other bills on other shops, which were returned, which makes us short of cash at the present time. I have called this day on Mr. Phillips about his bill; he was not at home. I shall call again to-morrow. You may make yourselves very easy about what we owe you." Lord Denman, C. J., left it to the jury to say whether they could infer, from this letter of the defendants', that due notice had been sent by the plaintiffs; and if so, to find a verdict for the plaintiffs. The jury found a verdict for the plaintiffs,—

And the Court said, that, as the letter bore date subsequent to the time when the bills became due, and, at a time when the defendants might have required notice of the dishonour of the bills, was written by the defendants—it was rightly left to the jury as evidence, from which they might, or might not, infer an acknowledgment of having had notice of the dishonour of the bills upon which the action was brought.

BOULTON v. WELSH, E. T. 1837. C. P. 3 Bing. N. S. 688.

But a mere notice that the bill became due, and was dishonoured,

THE indorsee of a promissory note wrote to the indorser, the day after the note became due, the following letter:—"Sir, the promissory note for £200, drawn by Henry Hanley, dated the 18th of July last, payable three months after date, and indorsed by you, became due yesterday, and is returned to me unpaid. I therefore give you notice thereof, and request you will let me have the amount thereof forthwith." It was contended that the notice was insufficient, on the authority of the cases of *Hartley v. Case*, (ante, p. 307), and *Solarte v. Palmer*, (ante, p. 307).

And by the Court:—We should be strongly inclined to support

that which has been done, but for the two decisions to which our attention has been called; and of these we cannot, we think, get rid. We cannot make the present a legal notice, after the decision of the House of Lords confirming that of the Exchequer Chamber.

SOLARTE v. PALMER, T. T. 1831. C. P. 7 *Bing.* 530; S. C. 5 *M. & P.* 475; S. C. 1 *C. & J.* 417; S. C. *Dom. Proc.* 1 *Bing. N. S.* 194; S. C. 1 *Scott*, 1. See *ante*, p. 307.

THE notice of dishonour to an indorsee was in a letter from the attornies of the holder, stating only that the bill bearing the indorsement of the defendant had been put into their hands, with directions to take legal measures, unless immediately paid.

Per Cur.—Although a notice of dishonour does not require all the formality of a protest, yet it must in express terms, or by necessary implication, inform the party that the bill has in fact been dishonoured.

or an attornies' letter, that they are "to take legal measures, unless immediately paid,"*

STRANGE v. PRICE, E. T. 1839. K. B. 10 *A. & E.* 125; S. C. 2 *P. & D.* 278; supporting *SOLARTE v. PALMER*, *supra*.

ASSUMPSIT by indorsee against indorser of a bill of exchange. Pleas—Non-acceptance, and that the defendant had not due notice on the dishonour of the bill. The bill became due on Saturday, the 24th December, 1836. On the 29th, the defendant received the following letter from the plaintiff:—"Swinden, Dec. 29th, 1836. Messrs. Strange, Strange & Co., inform Mr. James Price that Mr. John Bettaton's acceptance, 87*l.* 5*s.*, is not paid. As indorsee, Mr. Price is called upon to pay the money, which will be expected immediately."

or that A. "informs B., the defendant, that C.'s acceptance is not paid, and that, as indorsee, B. is called upon to pay the money, which will be expected immediately," is not a good notice.

Lord Denman, C. J.—Doubt has been thrown on some of the reasoning used in the case of *Solarte v. Palmer*, *ante*, p. 307, but its direct authority has never been questioned. I think that authority applies here. The notice is not sufficient, from not stating that the acceptor was called upon to pay. Whether or not that circumstance can be implied from its words, such implication was at least equally cogent in those cases in which the notice was rejected; in which view the Court concurred.

WALTER v. HAYNES, 1824. N. P. 1 *Ry. & M.* 149.

IN an action by indorsee against indorser—

Abbott, C. J., held, that a letter containing a notice of dishonour, directed to "Mr. Haynes, Bristol," was too general to raise a presumption that he received it; and proving that it was put into the post-office was insufficient.

A notice of dishonour, sent by post, to "Mr. A. Bristol," is too general an address;

MANN v. MOORS, E. T. 1825. N. P. 1 *Ry. & M.* 249.

IN an action against the drawer of a bill, it appeared that the bill was dated simply "Manchester."

but "Manchester" has been holden suffi-

* A letter by the plaintiff's attorney, stating that a bill, describing it, "lies due and unpaid at my office," held insufficient, the notice not stating the bill to have been presented and dishonoured: but a verbal statement to the drawer, that the bill has come back from the drawee dishonoured, the bill being shewn with the notary's mark, held sufficient. *Phillips v. Gould*, H. T. 1838, N. P., 8 *C. & P.* 355.

cient, where the bill was so dated ;

Abbott, C. J., held, that the letter containing notice of its dishonour, directed as generally as the bill, was sufficient.

CLARKE v. SHARP, H. T. 1838. Ex. 3 M. & W. 166.

or simply "London," it may be left to the jury to say whether it be sufficient.

THE bill was drawn by the defendant, dated merely "London," on the acceptor, resident also there, but his address was fully stated.

The Court held that a letter, containing notice of the dishonour, put into the post-office by the holder in the country, addressed to the defendant, simply "London," was evidence to go to the jury of due notice of dishonour.

2. *When verbal.*

HOUSEGO v. COWNE, H. T. 1837. Ex. 2 M. & W. 348.—S. P. WOODTHORPE v. LAWES, M. T. 1836. Ex. 2 M. & W. 109.

Verbal notice of dishonour left with the wife is sufficient.

A PERSON called at the drawer's house on the day after a bill had become due, and saw the drawer's wife. He stated he had brought the bill which had been dishonoured; she said she knew nothing about it, but would tell her husband; and he came away without leaving any written notice.

The under-sheriff held that this was sufficient, and the plaintiff recovered a verdict. And the Court refused to set aside the verdict.

(d) BY WHOM TO BE GIVEN.

CHAPMAN v. KEANE, E. T. 1835. K. B. 4 N. & M. 607; S. C. 3 Ad. & E. 193; overruling TINDAL v. BROWN, 1 T. R. 167.

The notice of dishonour need not be given by plaintiff, he may use a notice given by any other party*.

THE note had been drawn on and accepted by Lord Edward Thynne; it was indorsed to the plaintiff and afterwards indorsed by him in blank and given to one Wiltshire, who discounted it. Wiltshire left the bill in the hands of the plaintiff's clerk, with instructions to obtain payment or give notice of dishonour, which latter he did in the name of Chapman the plaintiff. It was objected, on the authority of *Tindal v. Brown*, 1 Term Rep. 167, that notice of dishonour must come from the holder, which Chapman was not at the time.

But the Court held, that if due notice of dishonour be given by any party to the bill, it is sufficient to enable the holder to sue, and it is not requisite that the party at the time of giving notice should be the holder of the bill.

WOODTHORPE v. LAWES, M. T. 1836. Ex. 2 M. & W. 109.

So, an attorney, who has a bill placed in his hands to present, may give

IN an action on a bill of exchange it appeared, that an attorney, in whose hands a bill, indorsed in blank, was lying at the time when it became due, and was dishonoured, wrote to the drawer a letter stating that it had been dishonoured and remained unpaid.

* It has been held by Lord *Eldon*, that notice by the first indorser who had not himself received notice from the second indorser, and who was not therefore obliged to take back the bill, was insufficient as between the second indorser and the drawer. (*Ex parte Barclay*, 7 Ves. 597).

His letter contained his address, but did not state on whose behalf he applied, or where the bill was lying, or to whom it was to be paid.

Per Cur.—The notice is sufficient. The bill was indorsed in blank, and *prima facie* he was the holder and had a legal right to it, though his right might have been qualified by evidence.

notice of dishonour, stating his own name and residence*.

(e) HOW TO BE SENT.

STOCKEN v. COLLINS, H. T. 1841. N. P. 9 C. & P. 653; S. C. 7 M & W. 515.

THE defendant, being entitled to notice of dishonour of a bill of exchange on the 28th of April, and all the parties living in town, a witness stated, that he put a letter, containing the notice of dishonour, into the post, at one o'clock P. M. on the 28th. The post mark on the letter was the 29th.

If sent by the post, the post-office mark is not conclusive evidence as to the time †.

Per Rolfe, B.—If this letter was put into the post at the time at which the witness says it was, it may have been overlooked in the post-office, and delayed there, as the post-office is not infallible. On the other hand, the witness may be mistaken as to the time at which the letter was put into the post. If you think that the letter was put into the post before one o'clock on the 28th of April, as the witness says it was, I think that it is good, and that the plaintiff will be entitled to your verdict; but if the letter was put in at the time which the post mark denotes, it was too late, and you ought to find for the defendant.

(f) WHAT CIRCUMSTANCES AMOUNT TO A WAIVER OF NEGLECT TO GIVE NOTICE.

STANDAGE v. CREIGHTON, M. T. 1832. N. P. 5 C. & P. 406.

INDORSEE v. indorser. No proper notice of dishonour of the bill had been given. To dispense with the notice the plaintiff's attorney said, that the managing clerk of the defendant's attorney had offered to pay down 30*l.* and the costs, and to secure the residue by a warrant of attorney.

Lord Denman, C. J.—I think that that is not sufficient to dispense with proof of the notice of dishonour.

Lord Denman, C. J., decided, that notice of dishonour is not dispensed with by shewing that a warrant of attorney and partial payment were offered ‡.

* There are two *Nisi Prius* cases, (*Shaw v. Cross*, Chit. Rep. 227; *Rosher v. Kieran*, 4 Camp. 87), to be found in the books, in which Lord Kenyon and Lord Ellenborough are reported to have held respectively, that notice of dishonour from the acceptor himself was equivalent to notice by the holder. But, it is conceived that in those cases the holder must have constituted the acceptor his agent for the purpose of giving notice, or that they are not law, being at variance with the general principle laid down in *Tindal v. Brown*, and recognised in a variety of subsequent cases; but *Tindal v. Brown* is now overruled. (Ante, p. 312. See *Baker v. Birch*, 3 Camp. 107; *Picken v. Graham*, 1 M. & M. 725).

† Putting a letter into the post is the most common and the safest mode of giving notice; it is not necessary to prove that the letter was received, and any miscarriage will not prejudice the party giving notice. (*Saunderson v. Judge*, 2 H. Bla. 509; *Kufh v. Weston*, 3 Esp. 54; *Parker v. Gordon*, 7 East, 385; *Langdon v. Mills*, 5 Esp. 157; *Dobree v. Eastwood*, 3 C. & P. 250).

‡ In general, the consequences of neglect of notice will be waived by a subsequent promise to pay, or by a payment of part, or by an acknowledgment of

DIXON v. ELLIOTT, M. T. 1832. N. P. 5 C. & P. 437.

But Park, J., in another case, entertained a different opinion.

INDORSEE v. indorser. It was proved, in an action against the indorser of a bill of exchange, that, two months after it was due, it was produced to him, and inquiries were made as to the drawer and acceptor; upon which he said, that if the holder would take 10s. in the pound, he would secure it.

It was contended, that these circumstances did not dispense with proof of notice of dishonour,

But Mr. Justice Park said, that he thought it was sufficient.

FLETCHER v. FROGGATT, H. T. 1827. N. P. 2 C. & P. 569.

Where defendant stated he did not mean to insist on want of notice of dishonour, but that he was only bound to pay 70l.:—Held, plaintiff could not recover more than that sum.

IN the absence of proof of sufficient notice of dishonour, proof that the drawer stated that he did not mean to insist on the want of notice, but that he was only bound to pay 70l., and not 200l., the amount of the bill sued on:—It was contended, that, as it was a waiver of the objection on the ground of want of notice, it would entitle the plaintiffs to recover the whole amount of the bill.

Sed per Abbott, C. J.—The defendant does not say that he will pay the bill, but that he is only bound to pay 70l. I think the plaintiff must be satisfied with the 70l.

PICKIN v. GRAHAM, T. T. 1833. Ex. 1 C. & M. 725; S. C. 8 Tyrw. 923.

To dispense with formal notice of dishonour, an engagement to pay upon the supposition that a bill would be returned, must be express and unconditional*.

THE day on which the bill became due, one of the indorsees sent an intimation to the defendants, the drawers, that he had seen Mr. Potter, an attorney, a subsequent indorsee, who had told him that the bill would not be paid. The next day, the defendant's clerk called at Potter's office, and told him, that he had come in consequence of a notice he had received the day before of the dishonour of the bill. He said, "I suppose there will be no alternative but by taking up the bill, and if you will bring it to me next Tuesday I will pay you the money." The plaintiff rested his right to recover on the conversation between Potter and the defendant's clerk on the 30th of May. But *Alderson, B.*, thought, that the promise by the defendant's clerk did not dispense with notice of dishonour, and nonsuited the plaintiff.

On motion for a new trial, the Court entertained the same opinion, and said that the promise must be absolute and unconditional, and not a qualified promise on the mere speculation of the dishonour of a bill.

See Tindal v. Brown, 1 T. R. 167; Borradaile v. Lowe, 4 Taunt. 93.

liability. (*Vaughan v. Fuller, 2 Stra. 1246; Horford v. Wilson, 1 Taunt. 12; Lundie v. Robertson, 7 East, 231; Brett v. Levell, 13 East, 231; Wood v. Brown, 1 Stark. 217; Hopes v. Alder, 6 East, 16; Whitaker v. Morris, 1 Esp. N. C. 60; Rogers v. Stephens, 2 T. R. 713; Margetson v. Aitkin, 3 C. & P. 338; though after action brought, Hopley v. Dufresne, 15 East, 275).*

* It seems, however, in some recent cases, to have been considered, that a promise to pay is only evidence from which a jury may presume that notice has been received. (*Hicks v. The Duke of Beaufort, 4 Bing. N. C. 229; and see Booth v. Jacobs, 3 Nev. & M. 351; Picken v. Graham, 1 Crompt. & Mees. 728; but see Lundie v. Robinson, 7 East, 231; Haddock v. Bury, Id. 236, n.; Anson v. Bayley, B. N. P. 276; Hopley v. Dufresne, 15 East, 275; Norris v. Salomonson, 4 Scott, 257).* Though a party may waive the consequences of laches in respect of himself, he cannot do so in respect of antecedent parties. (*Rosco v. Hardy, 12 East, 434; Turner v. Leach, 4 B. & A. 451).*

LEONARD *v.* WILSON, E. T. 1834. Ex. 2 C & M. 589; S. C.
4 Tyrw. 415.

ASSUMPSIT by indorsee against indorser. The bill was indorsed by the payees to the defendants, and by them to the plaintiffs; and after several mesne indorsements to parties who indorsed it in mistake as to one of the names, it was presented at the house where made payable, and refused for want of advice only, and no objection made to the title of the holder on the ground of indorsement by former holders being in the name incorrectly spelt, although, on subsequent applications to parties to whom it was addressed in case of need, they objected on account of such mistake.

The Court held, that such refusal did not affect the liability of the defendant to the plaintiff, the holder not being bound to present at the place of need; and the want of notice by him to the defendants was not irregular.

A refusal by the acceptors for want of advice and notice given, is sufficient to charge an indorser, though there be an indorsement—"in case of need A. B. will pay"—who refuses, and no notice given.

(g) LIABILITY OF A PARTY FOR NOT GIVING NOTICE.

HUNTLEY *v.* SANDERSON, E. T. 1833. Ex. Chamb. 1 C. & M. 467.

S. & Co., the owners of a ship of which H. was captain, despatched the latter to Miramichi, with instructions to purchase a cargo of timber, and to draw upon them for the amount. H. proceeded to Miramichi accordingly, and there purchased some timber from one L. for 154*l.* 11*s.* 11*d.*, and drew a bill upon S. & Co. for the amount, at sixty days' sight, in favour of the seller or his order. The bill was dated 4th September, 1826, and on the 21st of November, it was duly presented for acceptance and protested for non-acceptance. The plaintiff was in Liverpool with the ship under his command, from October, 1826, until April, 1827. It was not proved that the plaintiff received any notice of the dishonour of the bill, either from the then holder or from the defendants who had got the cargo. In 1832 the plaintiff was arrested upon the bill at Miramichi, and paid it in order to release himself from the arrest. In a special action of assumpsit, brought by the plaintiff against the defendants for not paying the bill, for not accepting it, and for not indemnifying the plaintiff from all loss, &c., sustained by him from having drawn the bill—

The drawer of a foreign bill, who has received no notice of non-payment either from the holder or the acceptor for whom it was given, may sue the latter for not indemnifying him, he having paid the money under arrest.

The Court held, that, as under the circumstances it could not be said that he paid the debt improperly, the want of notice of dishonour to the plaintiff furnished no ground of defence in an action against the defendants for not indemnifying him.

XX. RELATIVE TO THE ACTS WHEREBY A PARTY TO A BILL OR NOTE MAY BE DISCHARGED.

(a) BY ABSOLUTE PAYMENT.

FARQUHAR *v.* SOUTHEY, M. T. 1826. N. P. 2 C. & P. 497; S. C. 1 M. & M. 14; S. P. MORLEY *v.* CULVERWELL, M. T. 1840. Ex. 7 M. & W. 175.

A. & Co. having accepted a bill for B.'s accommodation, B. paid it into the hands of his bankers, without notice, who retained

An acceptor can only be

discharged by payment, or an express agreement renouncing his liability.

possession of it for several years, charging him with interest for it, but never debiting him with the amount of the bill. During this time they became bankers to A. & Co. also, but never gave them notice that they held the bill against them. The balance of B.'s account was always against him; that of the account of A. & Co. in their favour, but very seldom to the amount of the bill. In an action by the bankers against A. & Co., *Littledale, J.*, held, that, under these circumstances, the defendants were not discharged, unless the jury should infer that the plaintiffs had entered into an agreement to discharge the defendants, or had expressly renounced all intention of holding them liable on the bill, or that the bill had been paid.

(b) BY RELEASE*.

(c) BY GIVING TIME.

HEWET v. GOODRICK, M. T. 1826. N. P. 2 C. & P. 468; S. P. BADNALL v. SAMUEL, 3 Price 521.

To constitute a giving time, the party must have disabled himself from suing.

THE holder, after having given due notice of dishonour, had taken a part from the acceptor, and offered to take the rest by instalments, if a warrant of attorney were given, but which was not given.

Per Abbott, C. J.—This is not giving time to the acceptor; giving time is where the party disables himself from suing on the bill; but giving the acceptor indulgence after notice of dishonour, and the holder getting all he can from the acceptor, is highly beneficial.

JAY v. WARREN, M. T. 1824. N. P. 1 C. & P. 532.

A cognovit at three weeks is not a giving time,

THE plaintiff, in an action against the acceptor, took a cognovit, stipulating that no judgment should be entered until three weeks.

Per Abbott, C. J.—Is there any decision which lays down, that, if after action brought the party take a cognovit, that is a giving of time? I am of opinion that it is no answer to this action. The mischief of holding that this discharged the other parties to a bill would be infinite.

See *Lee v. Levi*, 6 D. & R. 475; 4 B. & C. 390; *Hulme v. Coles*, 2 Swan. 12; *Stevenson v. Roche*, 9 B. & C. 77; *Price v. Edmunds*, 10 B. & C. 578.

LEE v. LEVY, T. T. 1825. K. B. 4 B. & C. 390; S. C. 6 D. & R. 475; S. C. 1 C. & P. 553.

if judgment could not be obtained sooner.

TWO actions were simultaneously commenced by one plaintiff against the acceptor and indorser of a bill; and before judgment against either, the plaintiff took a warrant of attorney from the acceptor for the payment of debt and costs by instalments, all of which were to be paid before judgment could have been obtained against him.

The Court held, that such giving time to the acceptor afforded no defence to the action against the indorser.

* A release before the bill is due, though good as between the parties, will not discharge the releasee from the claim of an indorsee for value, who took the bill before it was due without notice of the release. (*Dod v. Edwards*, 2 C. & P. 602).

PRICE v. EDMUNDS, M. T. 1829. K. B. 10 B. & C. 578.

DECLARATION against the maker of a note, which appeared to be the joint and several note of the defendant and another: and the defendant proved that he became a party to it as surety only, and that an action was brought against the principal, to be tried at the Spring Assizes, shortly before which a cognovit was given to secure the payment by instalments of 70*l.* on the 28th of April, 70*l.* in May, and the residue in June, but on failure in paying of either of the instalments, execution might issue for the whole; the plaintiff in that suit might have obtained, in regular course of practice, execution on the 29th or 30th April; and default having been made in the first payment, no indulgence was in fact obtained under the cognovit—the Court held that the defendant was liable; and *semble*, the party being on the face of the note liable as a principal, it was not competent to him to prove his liability only as a surety*.

Or one of several joint makers of a note giving a cognovit for not a longer time than judgment could have been obtained, does not discharge the others.

PHILPOT v. BRIANT, E. T. 1828. C. P. 4 Bing. 717; S. C. 1 M. & P. 754; S. C. 3 C. & P. 346.

THE executrix of a deceased acceptor verbally promised the holder to pay the bill out of her own private income, and the latter agreed to give her time, provided interest were paid, and accordingly forbore to sue.

Giving time under a promise does not discharge the other parties to a bill.

The Court held that the drawer was not thereby discharged; the promise by the executrix being void: and if the holder of a bill of exchange merely delay to sue the acceptor on its being dishonoured by him, but is under no binding contract to give time for payment, he does not thereby discharge the drawer or indorsers.

HALL v. COLE, H. T. 1835. K. B. 6 N. & M. 124; S. C. 4 A. & E. 577.

THE plaintiff and indorsee, in his declaration against the defendant, a prior indorsee, described S., his immediate indorser, as one and the same person as the drawer, and it appeared he knew the fact to be so; and it was pleaded, that after the dishonour the plaintiff took a cognovit from S., by which longer time was given than

The giving time must be to the principal, as a drawer, and not a mere surety as an indorser†;

* Same point, *Perfect v. Musgrave*, 6 Price, 111. But evidence to that effect has been admitted. (*Garra v. Jull*, S. N. P. 393; *Hall v. Wilcox*, 2 M. & M. 58). In *Rees v. Berrington*, (2 Ves. jun. 540), Lord Loughborough says, that “where two or three are bound jointly and severally, the surety cannot aver by pleading that he is bound as surety.” But in equity, a surety may aver and prove that he was only a surety, though the bond were joint and several. (*Heath v. Key*, 1 Y. & J. 434; *Nisbett v. Smith*, 2 Bro. C. C. 581; *Skip v. Huey*, 3 Atk. 91).

† It was formerly held, that, where a bill was accepted with consideration, for the accommodation of the drawer, the drawer was to be considered the principal debtor, and the acceptor as his surety; and therefore, that time given to the drawer would discharge the acceptor, but time given to the acceptor would not discharge the drawer. But this distinction has since been overruled; (*Fentum v. Pocock*, 5 Taunt. 192; *Carstairs v. Rolleston*, 5 Taunt. 551); and in *Courts of Law* the acceptor, in all cases of accommodation bills as well as others, is considered as the principal debtor, though the holder, at the time of making the agreement, or even of taking the bill, knew the acceptance to have been without value. (10 B. & C. 584; *Harrison v. Courtauld*, 3 B. & Ad. 36; *Nichols v. Norris*, 3 B. & Ad.

would otherwise have been required for obtaining judgment in the action: the Court said it was a good defence, although it was not expressly averred that the plaintiff knew that the person from whom he took the cognovit was also the drawer.

LYON v. HOLT, T. T. 1839. Ex. 5 M. & W. 250.

and be given
(and so stated in
the plea), by a
party to the bill
competent to do
so.

To a declaration by the indorsee of a bill of exchange, alleged to have been indorsed by the drawer to the defendant, by the defendant to W., and by W. to the plaintiff, the defendant pleaded, that the bill was indorsed by the defendant to H. for his accommodation, and without consideration; that H. indorsed it to W.; that the alleged indorsement by the defendant to W., in the declaration mentioned, was the said indorsement by the defendant to H., and by him to W.; and that, after the bill became due and was dishonoured, the plaintiff and H. stated an account respecting this and other dishonoured bills, on which H. was liable to the plaintiffs, and agreed to take from B. renewed bills in lieu of them, and not to press any parties for payment of the original bills during the currency of the latter; and averred that the substituted bills were accordingly drawn and accepted, and delivered to the plaintiff without the defendant's knowledge or consent, and that the plaintiff gave time thereby to the parties in the original bills. At the trial, the agreement alleged in the plea was proved in substance, but it appeared that H. did not indorse the bill to W.

The Court held, that this indorsement was a material part of the defence, since, unless H. was a party liable on the bill, the agreement between the plaintiff and H. was not such a giving of time as to discharge the defendant; and, therefore, that the plea was not proved, and the plaintiff was entitled to a verdict.

(d) BY NEGLECTING TO PRESENT.

SHUTE v. ROBINS, M. T. 1828. N. P. 1 M. & M. 133; S. C. 3 C. & P. 80.

A traveller not sending a bill payable after sight up to the principals for a week is not guilty of such laches as to discharge the indorser on the bankruptcy of the acceptor.

A BILL drawn by bankers in the country on their correspondents in London, payable after sight, is indorsed to the traveller of the plaintiffs on their account; he transmits it to them after an interval of a week, and they, two days afterwards, send it for acceptance, which is refused, the drawer having become bankrupt. If the bill had been sent by the traveller to his employers as soon as he received it, they would have been able to get it accepted before the bankruptcy; but sending it when he did, they could not do so.

Tenterden, C. J., held, that there was no laches on the part of the plaintiffs, or their servant, so as to deprive them of their remedy against the indorsers.

42, n.) The doctrine laid down in *Fentum v. Pocock* has even been doubted in equity by Lord Eldon, (*Ex parte Glendinning*, Buck, 517; *Bank of Ireland v. Beresford*, 6 Dow, 233); and by the late Master of the Rolls, Sir John Leach.

(e) BY TAKING A COMPOSITION.

LEWIS v. JONES, E. T. 1825. K. B. 4 B. & C. 506; S. C. 6 D. & R. 587.

ASSUMPSIT, on a promissory note, by the indorsee against an indorser for the accommodation of the maker. The plaintiff had signed an agreement to take 5*s.* in the pound from the maker and his father, as a collateral security, in full of his demand. The agent of the maker also represented to the plaintiff, before signing the agreement, that the defendant would remain liable for the rest of his debt, and that the agreement would be void, unless the other creditors signed.

Taking a composition from the principal discharges the surety*.

The Court held—first, that the surety was discharged by the plaintiff's execution of the agreement; secondly, that the representations of the maker's agent, as to the legal effect of the agreement, were immaterial, and did not avoid it; also, per Justice Bayley, that parol evidence of one of their representations, which gave a meaning to the agreement different from that which appeared on the face of it, was inadmissible.

NICHOLSON v. REVELL, H. T. 1836. K. B. 4 Ad. & E. 675; S. C. 6 N. & M. 192, *questioning Ex parte GIFFORD*, 6 Ves. jun. 805.

THE holder of joint and several notes, upon one becoming due, agreed with one of the sureties to accept a sum in full satisfaction of the note due, and of the moiety for which the surety was liable on those not due, which was paid, and the name of the surety erased from the notes. In an action against the other surety, on the question whether he was discharged—

So, taking a composition from a surety to joint and several notes, in full satisfaction, some due and others not due, discharges the other parties.

Per Cur.—We are of opinion that he is, and we ground our decision upon the principle given by the Court in *Cheetham v. Ward*, (1 B. & P. 630), that, if the action be gone as to one of two joint and several obligors, it is gone as to both. This view of the case cannot be altered by what was said in the case *Ex parte Gifford*. No doubt, what fell from the learned Judge is entitled to the greatest respect; but it does not appear that the principle established by the decision in the Year Book, and acknowledged in *Cheetham v. Ward*, was presented to his Lordship's mind. We do not, therefore, feel ourselves fettered by that as an authority.

XXI. RELATIVE TO THE PROTEST AND NOTING†.

By 2 & 3 Will. 4, c. 98, "Whereas doubts have arisen as to the place in which it is requisite to protest for non-payment of bills of

Bills payable not at the residence of the

* If a creditor execute a deed of composition, having indorsed away bills on the debtor, the deed is no defence to an action on the bills when they are returned to the creditor. (*Markeson v. Aitken*, 3 C. & P. 338; *Ex parte Wilson*, 11 Ves. 410; *Ex parte Smith*, Co. Bl. 168—171; *Ellison v. Dezell*, 1 S. N. P. 355).

† Noting is a minute made on the bill by the officer at the time of refusal of acceptance or payment. It consists of his initials, the month, the day, the year,

drawee, if not accepted on presentment, may be protested for non-payment at that place.

exchange, which, on the presentment for acceptance to the drawee or drawees, shall not have been accepted, such bills of exchange being made payable at a place other than the place mentioned therein to be the residence of the drawee or drawees thereof, and it is expedient to remove such doubts; be it therefore enacted, That, from and after the passing of this act, all bills of exchange wherein the drawee or drawees thereof shall have expressed that such bills of exchange are to be payable in any place other than the place by him or them therein mentioned to be the residence of the drawee or drawees thereof, and which shall not, on the presentment for acceptance thereof, be accepted, shall or may be, without further presentment to the drawee or drawees, protested for non-payment in the place in which such bills of exchange shall have been by the drawee or drawees expressed to be payable, unless the amount owing upon such bills of exchange shall have been paid to the holder or holders thereof on the day on which the bills of exchange would have become payable had the same been duly accepted."

XXII. RELATIVE TO THE EXTINGUISHMENT AND SATISFACTION OF A BILL OR NOTE. *See also, tits. BANKRUPT—INSOLVENT DEBTOR.*

ATKINSON *v.* BYERS, E. T. 1834. K. B. 1 *Ad. & E.* 106.

Payment by a debtor of a smaller sum is no satisfaction.

IN this case, the Court decided that payment of a smaller sum is no satisfaction of a greater, unless the demand be unliquidated. *See Fitch v. Sutton*, 5 *East*, 230.

and his charges for minuting; (Kyd, 87); and is considered as the preparatory step to protest. "Noting," says Mr. Justice *Buller*, "is unknown in the law as distinguished from the protest; it is merely a preliminary step to the protest, and has grown into practice within these few years." (*Leffley v. Mills*, 4 T. R. 175). A bill however, is often noted, where no protest is either meant or contemplated; as in the case of many inland bills. The use of it seems to be that a notary being a person conversant in such transactions is qualified to direct the holder to preserve the proper conduct in presenting a bill, and may, upon a trial, be convenient evidence of the presentment and dishonour. In the mean time, the minute of the notary accompanying the returned bill is satisfactory assurance of non-payment or non-acceptance to the various parties by whom the amount of the bill may be successively paid.

Inland bills may be protested for non-payment under the 9 & 10 Will. 3, c. 17, and for non-acceptance under the 3 & 4 Anne, c. 9. But, it has been held, that a protest is unnecessary, except to enable the holder to recover interest; (*Harris v. Benson*, 2 Stra. 910); and subsequent and uniform practice, confirmed by a late decision, (*Windle v. Andrews*, 2 B. & A. 696), has settled that it is superfluous even for this purpose.

Foreign bills are very frequently protested, both for non-acceptance and non-payment; but a protest is hardly ever made for non-acceptance of an inland bill, though it is sometimes protested for non-payment. (Kyd, 25; 2 & 3 Will. 4, c. 98). It is conceived, that a protest of an inland bill is unknown to the common law, and must therefore derive its efficacy from the above enactments, from which it will follow, that it is applicable only to such instruments as are therein described, and that the steps therein required must be taken. As the 3 & 4 Anne, c. 9, puts promissory notes on the same footing as bills, it should seem to authorize a protest, and such protest is accordingly sometimes made. (Kyd, 97).

A protest is subject to an *ad valorem* stamp. (55 Geo. 3, c. 184).

WELBY v. DRAKE, M. T. 1825. N. P. 1 C. & P. 557.

THE defendant was drawer of a bill for 18*l.* 3*s.* 11*d.*, and the plaintiff had taken from the defendant's father 9*l.* in satisfaction of the whole debt. The plaintiff, notwithstanding, afterwards sued the defendant for the balance.

Aliter by a third party.

But *Abbott, C. J.*, said, "If the father did pay the smaller sum in satisfaction of this debt, it is a bar to the plaintiff's now recovering against the son; because, by suing the son, he commits a fraud on the father, whom he induced to advance his money on the faith of such advance being a discharge of his son from further liability."

SARD v. RHODES, H. T. 1836. Ex. 1 M. & W. 153; S. C. 4 D. P. C. 743; S. C. 1 T. & G. 298.

INDORSEE against acceptor. Plea—that, after the said bill became due, and before the commencement of this suit, to wit, on &c., the said G. P. made his promissory note for 45*l.*, and delivered the said note to the plaintiff, in full satisfaction and discharge of the said bill, and the said cause of action in said first count mentioned; and the plaintiff then accepted and received the said note in full satisfaction and discharge of the said bill. Replication—that, although the plaintiff accepted the said note in full satisfaction and discharge of the said bill, yet that the note was not paid when due, and still remains in the plaintiff's hands wholly unpaid and unsatisfied. Demurrer—that G. P. delivered, and plaintiff took the note, not merely on account or in payment of the bill, but in full satisfaction and discharge of the bill; therefore, it is immaterial whether the note has been honoured and paid or not; and if, as is admitted, it was taken absolutely in satisfaction and discharge of the cause of action, the defendant's liability on the bill could not revive upon the dishonour of the note; and the note of a third person may be an absolute discharge and extinguishment of the claim upon a bill of exchange.

And if note be accepted in full satisfaction and discharge, the original debt against the debtor will not revive.

Per Cur.—It is admitted by the plaintiff that he took it in full discharge and satisfaction; therefore, it is taken for better or worse. In the case of *Kearslake v. Morgan*, 5 Term Rep. 513, where it was decided that the non-payment of the second security revives the remedy on the original debt, it was averred that the indorsement was for and on account of the latter, which is not the case here.

TARLETON v. ALHUSEN, M. T. 1834. Ex. 2 A. & E. 32.

THIS was an action for goods sold and delivered, for which the defendants pleaded a set-off. The right of the plaintiffs to recover in this action depending upon which side the balance of the account stood, it became necessary, amongst other things, for the plaintiffs to prove payment of a bill of exchange for 1,800*l.*, which was drawn by Tarleton, who handed it over to Pollard, who paid it away to the defendants. This bill, when due, was dishonoured, it being in the hands of the defendants' bankers, who sued Tarleton, and obtained judgment; but there was no proof of the judgment having been satisfied, and the bankers afterwards returned the bill to the defendants. It was contended, on the part of the plaintiffs, that a judgment so obtained was equivalent to payment.

A judgment is not an extinguishment without satisfaction.

But Lord *Lyndhurst, C. B.*, thinking that, without shewing any produce under the judgment, it could not be considered as payment,

and if not payment, the balance on the account being in favour of the defendants, nonsuited the plaintiffs.

On motion to set the nonsuit aside, the Court refused the rule, saying judgment without satisfaction is no payment.

XXIII. REMEDIES UPON, BY ACTION.

(a) REMEDY AGAINST A PARTY WHO HAS SUBSCRIBED HIS NAME IN TWO DISTINCT CHARACTERS*.

(b) WHO MAY SUE AND BE SUED.

STONES *v.* BUTT, H. T. 1834. Ex. 2 C. & M. 416; S. C. 2 D. P. C. 335; S. P. DOBBS *v.* HUMPHRYS, T. T. 1833. C. P. 10 Bing. 446; S. C. 1 Scott, 325.

A plaintiff may sue, though he has not the bill in his possession†.

THE plaintiff was not, at the time when the defendant was arrested, in possession of the bill of exchange on which the action was brought, but it was in the possession of persons to whom the plaintiff was indebted, and to whom he had indorsed it over; but it appeared that those persons only held the bill as trustees for the plaintiff, and that they were ready to give up possession of the bill to the plaintiff for the purposes of the suit.

Per Cur.—The plaintiff has clearly a right to sue on the bill.

REID *v.* FURNIVAL, E. T. 1833. Ex. 1 C. & M. 538.

A. receives a bill to get it cashed; he gets money advanced on it on his guarantee:—Held, that A. was entitled to sue on the bill.

INDORSEE against acceptor. It appeared that a bill of exchange for 300*l.* being sent to plaintiff to get it discounted, a banking company advanced 100*l.* on the bill, upon plaintiff giving the company his guarantee for the amount so advanced. Plaintiff had no other interest in the bill. In an action brought by plaintiff on the bill—

Per Cur.—As soon as the plaintiff recovers the whole amount he becomes a trustee for the person entitled to the remainder of the money, after deducting the amount that he has advanced. There is a decision bearing on this point, to that effect, in 2 Wilson, 262—*Johnson v. Kennion*.

EMES *v.* WIDDOWSON, M. T. 1829. N. P. 4 C. & P. 151.

An assignment of property to secure a bill does not suspend the remedy on it when dishonoured.

AN assignment was made of property for the purpose of securing debts due and to be due, with a power of sale upon giving six months' notice. In an action by drawer against acceptor, defence, that the assignment suspended the personal remedy—

Sed per Tindal, C. J.—I am of opinion that such an assignment can only be considered as a collateral security, and that the personal remedy is not suspended, as there is not any clause to that effect in the deed.

* Where a party was sued jointly with others as drawers, and separately as acceptor of a bill, the Court considering him liable in the two characters, which could not be comprised in the same declaration, and the plaintiff entitled to both remedies, refused to stay the proceedings in one as vexatious. (*Wise v. Prowse*, 9 Price, 393).

† An indorsee, without notice that a prior action is pending, may sue the same defendant thereon. (*Colombres v. Slim*, T. T. 1820, K. B., 2 Chit. Rep. 637).

A party who accepts a bill, not in his own Christian name, but in that assumed as a firm of A. B. & Co., if he be served with process, it is sufficient. (*Alderson, B.*—*Wilde v. Keep*, H. T. 1834, N. P., 6 C. & P. 235).

HALLETT v. DEWIS, M. T. 1827. C. P. 1 M. & P. 79.

J. S. DREW a bill on the defendant (which the latter accepted for the accommodation of the former) and indorsed it to the plaintiff as his agent, in which character the plaintiff paid it away, on account of the drawer, for wine contracted to be purchased for him. Subsequently, the wine contract being rescinded, the holder of the bill refused to give it up until he had been paid a sum of 150*l.*, which he alleged to be due to him from the drawer. The plaintiff engaged to pay it, received the bill, and sued the defendant as the acceptor.

But, a knowledge that a bill is given for a particular purpose, which fails, precludes the party from suing.

The Court held, that, as he could not hold it for a different debt, nor sue the acceptor, he could not therefore, by transferring it to the plaintiff in consideration of his paying the latter debt, give him a right of action against the defendant on such acceptance.

SIDDALL v. RAWCLIFFE, E. T. 1833. Ex. 1 C. & M. 487.

IN an action on a promissory note, it appeared that the note was for 100*l.*, on the face of it payable on demand; and that it had been given to the trustee of a building society, to secure certain instalments, fines, and interest. The payee having sued upon the note, took a cognovit for the instalments then due, and costs, which were afterwards paid; and he gave a receipt as for debt and costs in the action. The present action being brought on the note for instalments which subsequently became due—

So, a note given to the trustee of a building society to secure certain instalments, cannot, after payment, be sued on again.

Per Cur.—The note here is in the simple and ordinary form. Your object is to give it quite a different character, and to make it a new contract. Can you do that by parol evidence? How can you hold a common promissory note as a continuing guarantee? You can only sue once upon it. You cannot have a remedy in two actions upon one note.

GODSON v. RICHARDS, M. T. 1833. N. P. 6 C. & P. 188.

IN an action by executors against the makers of a note, it appeared that the payee indorsed the note and gave it to C. to get it discounted, who afterwards returned with the money; and the note was afterwards sued upon by the executor of C.'s father.

Littledale, J., held, that production of the note by the plaintiffs, as executors, was sufficient without shewing that the money was advanced by the testator.

Executors may sue on a note which they produce, though there is no evidence to shew their testator ever had the note.

ATTWOOD v. RATTENBURY, M. T. 1826. C. P. 6 Moore, 579.

IN an action of assumpsit by the indorsees against the drawer of a bill of exchange, in their own right, it appeared that the bill had been indorsed to them in blank, before the death of one of the firm who was a partner with the plaintiffs as bankers. The declaration did not describe them as surviving partners.

The Court held, that it was not necessary for the plaintiffs to declare as surviving partners; a bill being transferable by delivery, the survivors became the holders in point of law, and, being indorsed in blank, need not prove their joint title, or a transfer to them jointly. If it had been specially indorsed, it must, like any other contract, have been declared on in the terms made.

On a bill indorsed in blank to a firm, one of whom died before action brought:—Held, the plaintiffs need not sue as surviving partners.

(c) REMEDY MUST BE ON THE BILL OR NOTE.

BENTLEY v. NORTHHOUSE, E. T. 1827. N. P. 1 M. & M. 66.

A note must be declared on, and cannot be given in evidence under the common counts between persons not in privity.

INDORSEE against maker of a note. On a question arising as to giving the note in evidence under the common counts, it was said that, in the case of *Carr v. Shaw*, (Bayley on Bills, 4th ed., p. 22), the objection was made, and the Court of King's Bench intimated a strong opinion in favour of it; however, the action being between the immediate parties to the note, the plaintiff was allowed to recover on the money counts. Here he cannot do so, for he is an indorsee, and the action is against the maker.

Lord Tenterden, C. J.—That circumstance prevents the plaintiff from recovering on the money counts.

(d) FORM OF ACTION*.

HATCH v. TRAYES, H. T. 1840. Q. B. 3 P. & D. 408; S. C. 11 Ad. & E. 702.

Debt lies by payee against maker, or drawer against acceptor, though the words "value received" are omitted †.

DEBT was brought by the payee against the maker of a promissory note, not expressed to be for "value received." To the declaration there was a general demurrer.

Per Cur.—The question is, whether, looking to the situation of the parties to the bill and note, the action of debt would lie where the bill and note respectively were not stated to have been given for "value received." We are of opinion, that the action may be maintained between immediate parties.

CLOVES v. WILLIAMS, M. T. 1836. C. P. 3 Bing. N. S. 868.

But debt does not lie by indorsee against acceptor; and a count stating a promise, but concluding "whereby an action hath accrued, &c.," is in debt.

ACTION of assumpsit. One of several counts in the declaration stated, that the defendant accepted a bill of exchange, and promised to pay the amount to the plaintiff according to the tenor and effect thereof, whereby an action accrued to the plaintiff to demand and have of and from the defendant the amount thereof. The defendant pleaded over, and the plaintiff demurred to his plea, which the defendant's counsel abandoned, but contended that the declaration was in substance in debt.

The Court held that it was so, and that debt did not lie by indorsee against the acceptor of a bill of exchange; but allowed each party to amend without costs on either side.

* Trover will lie, though at the suit of one who is no party to the bill, (*Treuttel v. Barandon*, 8 Taunt. 100), or at the suit of the payee or acceptor, against a defendant to whom the plaintiff's agent has wrongfully assigned it, though the defendant have a right of action on the bill against the agent. (*Goggerly v. Cuthbert*, 2 N. R. 170; *Evans v. Kymer*, 1 B. & Ad. 528. See *Cramp v. White*, 1 Bing. N. C. 414).

In an action of trover, a verdict may in all cases be given for the full amount of the bill; but if the defendant deliver up the bill, nominal damages may be entered on the record.

† And by indorsee against his immediate indorser. (*Watkins v. Wake*, H. T. 1841, Ex., 7 M. & W. 488; S. C. 9 D. P. C. 242).

POWNAL *v.* FERRAND, E. T. 1827. K. B. 6 B. & C. 439.

THE indorser being sued paid part, and, in the action by the holder against the acceptor, credit was given for the sum so paid. The indorser brought an action against the acceptor for so much money paid to his use.—

Money paid
lies by indorser
against acceptor
who has paid
part to his in-
dorsee.

The Court held, that the plaintiff was entitled to recover. The defendant was the first defaulter, he being the acceptor; and upon him alone was the expense and loss properly chargeable. The plaintiff, as indorser, was only surety for the defendant; as surety he was forced to pay; and the payment, like that in every ordinary case between principal and surety, was recoverable as money paid.

(e) AFFIDAVIT TO HOLD TO BAIL. See ante, tit. *Affidavit to hold to Bail.*

(f) ARREST. See ante, tit. *Arrest.*

(g) BAIL. See ante, tit. *Bail.*

(h) DECLARATION.

1. *Venue*.*.

2. *Intituling of*†.

3. *Stating the Bill or Note.*

COOMBS *v.* INGRAM, E. T. 1823. K. B. 4 D. & R. 211.

DECLARATION on a note promising to pay £—— with lawful interest; the note, when produced, appeared to be intituled in a cause, and to be “for the amount of the debt and costs in this action:” and upon objection that it was a mis-description, the Court held, that the whole note need not be set out, but only so much of the substance as is necessary to shew a promise to pay.

The whole of
the note need
not be set out;
sufficient to
shew the pro-
mise will do.

4. *Date*.†

GILES *v.* BOURNE, H. T. 1818. K. B. 6 M. & S. 73; S. C.
2 Chit. Rep. 300.

IN an action of assumpsit by the indorsees against the drawer of a bill of exchange, in their own right, it appeared that the bill had

A declaration
that A. made

* The venue is transitory, and may be laid in any county.

† By rule H. T. 4 Will. 4, every declaration shall be intituled the day, month, and year when the same is pleaded. Before that rule, in an action on a promissory note, it appeared that it became due on the 20th June, and presentment and notice of dishonour were proved on the 23rd, and the bill was filed on the 30th:—Held, that the cause of action had accrued before the commencement of the action, although the first day of term was on the 22nd, and, therefore, the memorandum on the record generally of the term was irregular. (*Howe v. Cocker*, 3 Stark. 138). Where the bill on which the action was brought became due after the first day of the term of which the declaration was generally intituled:—Held, that the plaintiff might prove by parol the time of the commencement of the action, without producing the writ, the indorsement thereon being only a memorandum of the attorney in the cause. (*Lester v. Jenkins*, T. T. 1828, K. B., 8 B. & C. 339).

‡ If the declaration omits the date of the bill, it may be amended at the trial.

his bill on &c., will be intended to be the day it was dated and made.

been indorsed to them in blank before the death of one of the firm, who was a partner with the plaintiffs, as bankers. On demurrer—

The Court held it good, because it must be intended to have been dated on the day when alleged to have been made.

5. *That the Acceptance was in Writing.*

CHALIE *v.* BELSHAW, E. T. 1830. C. P. 6 *Bing.* 529; S. C. 4 *M. & P.* 275.

Statement, that the defendant accepted the bill, without adding "in writing," is sufficient.

DRAWER against acceptor. The plaintiff declared in the usual form that the defendant, according to the usage and custom of merchants, accepted the bill (which was drawn by the plaintiff). Demurrer—that it was not stated that the defendant accepted the bill in writing, or that the acceptance of the same was in writing—

But the Court were of opinion that there was nothing in the objection; for that, if valid, it would equally apply to a declaration on a cause of action requiring a note in writing under the Statute of Frauds, which would be absurd.

6. *Parties to.*

LINDSAY *v.* WELLS, E. T. 1837. C. P. 5 *D. P. C.* 618.

A declaration, stating the plaintiff's name as on the bill by the initial of one Christian name, is aided by the 3 & 4 Will. 4, c. 42, s. 11.

IN an action on a bill of exchange the declaration was objected to. The irregularity complained of was, that the plaintiff had styled himself Henry H. Lindsay, whereas he was bound to state his second name at full length, and give the defendant that degree of certainty and knowledge which were necessary to his defence.

The Court were of opinion that there was no ground for the objection, since the 3 & 4 Will. 4, c. 42, s. 11.

SPILLER *v.* JOHNSON, E. T. 1840. Ex. 6 *M. & W.* 570.

Although plaintiff declare as clerk to a company, he need not state he is a member of the company, or duly registered.

THIS was an action by the public registered officer of a banking co-partnership, established under the provisions of stat. 7 Geo. 4, c. 46. The defendant demurred to the declaration, on the ground that it did not state that the plaintiff was a member of the company, that he was resident in England, and was duly registered.

Per Cur.—The plaintiff is entitled to judgment. If the fact be that he is not a member of the company, and has not complied with the terms of the act, the other party may avail himself of those omissions in his defence.

7. *Of the Words, "Or Order."*

SPYER *v.* THELWELL, M. T. 1835. Ex. 2 *C.*, *M. & R.* 692; S. C. 1 *Tyrw. & G.* 191; S. C. 4 *D. P. C.* 509.

The Court will refer the words, "his order," to the party really intended,

THE declaration stated that P. N. made his bill of exchange, and directed it to the defendant, and thereby required the defendant to pay to *his order* 127*l.* 7*s.* 6*d.* for value received; that the defendant accepted it, and P. N. indorsed it to the plaintiff.

And where a judge refused the amendment, and nonsuited the plaintiff, the Court set it aside, and gave leave to amend. (*Pullen v. Seymour*, T. T. 1836, Ex., 5 *D. P. C.* 164).

On demurrer, it was objected to the first count, that it is ambiguous and doubtful whether "his order" means the order of the drawer or the acceptor. According to the language of the declaration, it would refer to the last antecedent, and then it means the order of the acceptor.

But the Court held, that the Court could see that the word "his" referred to the drawer, and not to the acceptor; and, therefore, that there was no fatal ambiguity.

though the strict grammatical construction would be otherwise.

KNILL v. STOCKDALE, T. T. 1840. Ex. 6 M. & W. 478; S. C. 8 D. P. C. 772.

INDORSEE against acceptor of a bill of exchange. The declaration stated that one S. J., and one R. C., on the 24th September, 1839, made their bill of exchange in writing, and directed the same to the defendant, and thereby required the defendant to pay to the drawer's order. Demurrer—assigning for cause, that although the declaration stated the action to be brought by the plaintiff as indorsee and holder of a bill payable to the drawers thereof, it did not allege who those drawers were.

The Court set aside the demurrer as frivolous.

So, a declaration, stating that A. drew his bill, and required the defendant to pay to the "drawer's" order, omitting the name, held no ground of demurrer.

HART v. PROUDFOOT, H. T. 1840. Q. B. 8 D. P. C. 306.

INDORSEE of a bill of exchange against the acceptor. To the declaration the defendant demurred, and the ground of demurrer stated was, that it did not appear on the face of the declaration to whose order the bill had been drawn; in the declaration it was merely stated to be drawn "to order."

Patteson, J.—I cannot say, that it is a frivolous demurrer. It might have been drawn to the order of some other person, and not to that of the drawer.

But a declaration alleging a bill to have been drawn "to order," instead of to whose order, is demurrable.

8. *Of the Transfer of.*

CUNLIFFE v. WHITEHEAD, T. T. 1837. C. P. 3 Bing. N. S. 828.

IN an action against the acceptor of bills of exchange made payable to the order of the drawer, the declaration alleged that the drawer indorsed the bills to S. and F., who delivered them to the plaintiffs. On general demurrer—

Per Cur.—The rule of law is, that bills and notes are assignable either by delivery only, or by indorsement and delivery. Bills and notes, whilst payable to order, are assignable by the latter mode only, "and the bill here being so payable," it cannot pass without proof of indorsement as well as of delivery.

The declaration must state an indorsement—alleging a delivery will not do.

9. *Of the Presentment of.*

BUSH v. KINNEAR, E. T. 1818. K. B. 6 M. & S. 210.

AN acceptance was made payable at the house of Messrs. G. & Co., and the declaration averred, that the bill was in due manner shewn and presented to the said Messrs. G. & Co., and also to the

If an averment shew that the bill was pre-

sented at the house where payable, it is sufficient.

acceptor, and that they were required to pay the same according to the tenor and effect of the bill, and of the said acceptance. Upon demurrer—

The Court held, that, by the averment, it sufficiently appeared, that the bill was presented at the house which was the place of payment.

HANKEY *v.* BORWICK, E. T. 1827. Ex. 4 *Bing.* 135; S. C. 1 *F. & J.* 376.

As, if payable at the house of A., an averment of presentment there, without saying to A. or the acceptor, is sufficient*.

DECLARATION on a bill payable at the house of S. Averment of a presentment at the house of S., without averring presentment to S. or to the acceptor. On error—

The Court held, it was not necessary to aver a presentment to the acceptor or to S., a presentment at the house of S. being sufficient.

GILES *v.* BOURNE, H. T. 1818. K. B. 6 *M. & S.* 73; S. C. 2 *Chit. Rep.* 300.

Stating a bill to be payable at C.'s does not mean that C. will pay.

DECLARATION, that the defendant made his bill payable at C.'s, and did not aver that C. did not pay, but merely a presentment at C.'s house. On demurrer—

The Court held, that it did not purport that Messrs. C. would pay, but that the defendant would pay at their house; and an allegation, that it was presented there, and that defendant refused to pay, was sufficient.

WILLIAMS *v.* WARING, M. T. 1829. K. B. 10 *B. & C.* 2.

A place of payment stated in the margin of a note forms no part of the note, and need not be stated in the declaration. Aliter when in the body of the note.

THIS was an action on a promissory note, which ran in the usual form. At the bottom of the note, the defendant had written "at Messrs. Bosanquet & Co.'s, London." The declaration took no notice of the latter part of the note, but treated it as a common promissory note payable to order.

The Court held.—"1st. Where a promissory note mentions the place of payment in the body of the note, the plaintiff must aver and prove a presentment;—2nd. But where the place of payment is mentioned at the foot of the note, it is considered merely as a memorandum, and no part of the contract, and, consequently, it should not be noticed in the declaration, and presentment need not be proved.

10. *Notice of Dishonour.*

BIRD *v.* LEGGE, M. T. 1839. Ex. 5 *M. & W.* 418; S. C. 7 *D. P. C.* 814.—S. P. KEMBLE *v.* MILLS, H. T. 1840. C. P. 2 *Scott, N. S.* 121.

Notice of dishonour must be stated and proved, and if notice be waived, the declara-

Two bills of exchange, in the hands of an indorsee, fell due on two successive days, on the former of which his immediate indorser told him, that neither would be paid by the acceptor, and that notice of dishonour need not be sent to him, adding, that he would, in the following week, bring some money on account of the bills.

* And where payable at a particular place, a general averment of presentment is sufficient to charge the drawer or indorser after verdict. (*Lyon v. Holt*, 5 *M. & W.* 259).

In an action on the bills, and on an account stated, by one of these parties against the other, on which there was an issue as to notice of dishonour—

The Court held, that this conversation was not evidence of notice of dishonour, but of a dispensation with it, and that such dispensation should be specially shewn on the declaration. The Court granted a rule amending the record, by inserting an allegation, that notice of dishonour was dispensed with.

tion should be so framed.

FITZGERALD *v.* WILLIAMS, M. T. 1839. C. P. 6 *Bing. N. S.* 69; S. C. 8 *Scott*, 271.

ASSUMPSIT by the indorsee against the drawer of a bill of exchange for 100*l.*, at two months date, accepted by one Warre. The declaration, after alleging presentment to and dishonour by the acceptor, averred, that, neither at the time when the said bill was drawn, nor at any time afterwards, and before the bill became due, nor at the time when the bill became due, and was so presented for payment thereof as aforesaid, had the acceptor Warre in his hands any effects of the defendant; nor had the defendant, at or during any part of any or either of the said times, any reasonable cause or ground for expecting or supposing that he had or would have any effects in the hands of the said Warre, or that the said Warre would accept the said bill, or pay or discharge any part of the amount of the said bill, or be provided with funds wherewith he ought to pay the said bill or any part thereof; nor was there any consideration or value for the acceptance by the said Warre of the said bill, or the payment by him of the amount of the said bill or any part thereof; nor hath the defendant sustained any damage by reason of his not having had notice of the non-payment of the said bill by the said Warre: and thereupon the defendant, in consideration of the premises, afterwards promised &c. Pleas—first, that the bill was not presented when due to the acceptor; second, that, by reason of the defendant not having notice of the non-payment of the said bill by the said J. W. Warre, the defendant was and is damnified in this, to wit, that, at the time when the said bill was made and indorsed, as in the said declaration alleged, the said Warre promised the defendant to provide money for the payment of the said bill when the same should become due and payable, and to indemnify and save harmless the defendant from any loss or damage for or by reason of his making the said bill as aforesaid, of which the plaintiff then had notice; and the defendant further saith, that, at the time when the bill became due and payable, the said agreement made between Warre and the defendant was and still is in full vigour and effect, and not in anywise altered, rescinded, or annulled.

But the averment, that no damage had resulted to the drawer from want of notice of dishonour, because he had no effects in the hands of the acceptor, need not be proved.

Per Cur.—The plaintiff in the declaration alleges a sufficient excuse for the want of notice to the defendant,—that is, that the acceptor had not effects or funds in his hands to meet the bill. The plea does not contain a denial of any of the facts alleged as excuse, but merely alleges that an agreement was made between the defendant and Warre, by which the latter promised to provide funds for the payment of the bill, and to indemnify and bear the defendant harmless. As it appears to us, the excuse contained in the declaration for the want of notice would have been sufficient, if it had stopped at the allegation that the acceptor neither had the funds of

On a motion for a new trial.

the drawer, nor expected to have them, to meet the bill when it became due, but it goes further, and alleges that the defendant had not suffered any damage. That, however, does not render it necessary for the plaintiff to prove the averment, for the defendant was either not damnified, if he had no funds in the hands of the acceptor, or, if he was, the proof should have come from *him*.

11. *Of the Words, "which Period has now elapsed."*

ABBOTT *v.* ARLETT, H. T. 1836. Ex. 4 D. P. C. 759; S. C. 1 M. & W. 209; S. C. 1 Tyrw. & G. 448.

Formerly, a demurrer, that the declaration did not shew that the time for which the bill had to run had elapsed before action, was sustainable, though the form of the count was according to those given by R. T. T. 1 W. 4.

THIS was an action by drawer against acceptor of a bill of exchange. The declaration was in the exact form given by the Rules of Trinity Term, 1 Will. 4, with this averment, "which period has now elapsed." The defendant demurred specially, on the ground that it did not appear that the bill was due at the time the action was brought; that the words "now elapsed" refer to the time of declaring, &c. It was contended, that the defendant could not demur to a form of count framed by the judges and directed to be followed by pleaders.

Parke, B.—Those forms were published prior to the Uniformity of Process Act, and were correct at that time, because they referred to the time of filing the bill; but now, the commencement of the action has relation to the time of issuing the writ.

OWEN *v.* WATERS, M. T. 1836. Ex. 2 M. & W. 91; S. C. 5 D. P. C. 324.

In a subsequent case the allegation, "which period has now elapsed," was held sufficient, without adding, before the commencement of the suit.

DECLARATION by drawer against the acceptor alleged that the plaintiff, on the 29th of March, "made his bill payable four months after date, which period has now elapsed." On special demurrer—

Per Cur.—This case depends upon the question, whether it sufficiently appears that the bill was due before the time when the action was commenced. The Court have considered it, and think that it is not essential that it should appear, on the face of the declaration, that the right of action had accrued before the suit was commenced: in other words, that the Court does not look out of the declaration to determine whether or not it has been commenced too early.

12. *Statement of the Default on Notes payable by Instalments.*

TEAGUE *v.* MORSE, E. T. 1837. Ex. 2 M. & W. 599.

A count on a note payable by instalments, the whole to become payable on any default, need not aver that they were demanded.

IN ASSUMPSIT on a promissory note, payable by instalments, the whole to become payable on default made in any. Declaration averring such default, "whereby" &c. Demurrer, that, by default made in any instalments, the note did not become due without a demand of it.

The Court held the demurrer too large, there being a debt as to the instalments due.

13. *Of the Promise*.*

BANKS v. CAMP, H. T. 1832. C. P. 9 *Bing.* 604. S. C. 2 *M. & Sc.* 734.

A DECLARATION on a note stated that the defendant thereby promised to pay to the plaintiff 10*l.* on account of W. H. D., fourteen days after the date thereof, which period had elapsed; and then averred that the defendant, in consideration of the premises, "then and there promised to pay the amount of the note to the plaintiff, according to the tenor and effect thereof." On special demurrer—

The Court held the declaration sufficient; that the legal intentment was, that the promise was made to the plaintiff.

Declaration, that defendant "promised to pay the amount of the note to the plaintiff," held to mean that the promise was made to the plaintiff.

HENRY v. BURBIDGE, H. T. 1837. C. P. 3 *Bing.* N. S. 501; S. C. 4 *Scott*, 296; S. C. 5 *D. P. C.* 484.—**S. P. CHEVERS v. PARKINGTON**, M. T. 1837. Ex. 6 *D. P. C.* 75.

A DECLARATION by the indorsee against the drawer, for non-payment by the acceptor, alleged that the defendant indorsed the said bill to the plaintiff, and the said P. did not pay the said bill, although the same was presented to him on the day when it became due, whereof the defendant had notice. Special demurrer, alleging that the count contained no promise by the defendant to pay the monies therein mentioned—

Per Cur.—There is a broad distinction between the case of the drawer and that of the acceptor, the former being only liable upon a contingency. This action is against the drawer; it is not an action of debt, though such might lie against the drawer at the suit of the payee, but not against the acceptor of the bill. This is an action of assumpsit; and, strictly speaking, in all such actions the promise must be alleged.

A declaration against the drawer must allege a promise to pay, but need not against the acceptor.

GALWEY v. ROSE, H. T. 1840. Ex. 6 *M. & W.* 291; S. C. 8 *D. P. C.* 239.—**S. P. DONALDSON v. THOMPSON**, H. T. 1840. Ex. 6 *M. & W.* 316; S. C. 8 *D. P. C.* 209.

THE declaration stated, that, on &c., the defendant made his bill of exchange, and directed the same to A. & Co., payable to B. or his order three months after date, which period had elapsed before the commencement of the suit; that B. then indorsed it to the plaintiff; that it was presented for acceptance, and protested for non-acceptance, of which the defendant had notice; that the bill, being wholly unaccepted and unpaid, afterwards &c., when it became due, on &c., was presented for payment to A. & Co., who refused to pay the same, whereupon it was protested for non-payment; of all which the defendant had notice: and whereas, also, the said

In subsequent cases it was held, that, in an action by indorsee against drawer, the general promise attached to the common breach is sufficient.

* It seems that it is not absolutely necessary, even in an action of assumpsit by the indorsee against the indorser, to allege in the declaration a promise to pay by the defendant. "The drawing of a bill," says Lord Holt, "is an actual promise," (*Starkey v. Cheesman*, Saik. 128; Carthew, 509; *Wegerstoffe v. Keene*, 1 Stra. 214; *Buckler v. Angel*, 1 Sid. 246).

And a promise to pay according to the tenor and effect thereof means on request, where a bill was accepted after it was due. (*Christie v. Peart*, E. T. 1841. Ex. 7 *M. & W.* 491).

defendant, before &c., to wit, &c., was indebted to the plaintiff &c., on an account stated, and the defendant, in consideration of the premises respectively, then, to wit, on the day and year last aforesaid, promised the plaintiff to pay him the said several sums respectively on request. To this declaration, there was a demurrer for duplicity, and that the first count contained no promise.

The Court held, that, whether the first part of the declaration was considered as two counts or one only, it was not demurrable on either of the grounds of demurrer.

GRIFFITH *v.* ROXBURGH, M. T. 1837. Ex. 6 *D. P. C.* 133; S. C. 2 *M. & W.* 734.

And the omission to allege a promise a ground of special demurrer only.

INDORSEE against indorser. The declaration contained a count on the bill, and counts for money lent and money due on an account stated; and the promise laid was, "that defendant afterwards, on &c., in consideration of the last-mentioned premises, promised the plaintiff to pay him the said several last-mentioned monies respectively on request." After verdict for the plaintiff, on motion in arrest of judgment—

Per Cur.—Before the new rules, the question might have been different; but surely it cannot now be necessary to allege a promise, when the defendant is precluded from denying it. The defendant must deny "some matter of fact alleged," which shews that if the matter of fact alleged be true, the promise to pay necessarily follows. At all events, the omission is mere matter of form, which must be taken advantage of on special demurrer.

14. *Of the Breach.*

HEDGER *v.* STEAVENSON, T. T. 1837. K. B. 1 *N. & P.* 799; S. C. 5 *D. P. C.* 771.

A declaration, stating that the defendant delivered the note, and promised to pay; and the maker &c. did not pay at any time, is sufficient.

THE declaration on a note stated that one S. T. made &c.; and thereby promised to pay to the order of the defendant, at Messrs. T.'s, £—— two months after date, which period had before the commencement of the suit elapsed, who then delivered the said note to the plaintiff, and promised to pay the same according to the tenor and effect thereof; but that Messrs. T. did not, nor did the said S. T., nor the defendant, at any time pay &c, although the said note, when due, was presented at Messrs. T.'s on the day of its becoming due, of which defendant had notice. On motion in arrest of judgment—

The Court held that the promise was not incorrectly stated, and that the breach was sufficient after verdict.

15. *Joinder of Counts.*

COMPTON *v.* TAYLOR, T. T. 1838. Ex. 4 *M. & W.* 138; S. C. 6 *D. P. C.* 660.

The forms of declaration given by Rule T. T., 1 Will. 4,

THE declaration stated that the plaintiff complained of the defendant being detained &c., "in an action on promises, and he demands of him the sum of &c., which he owes to and unjustly de-

tains from him." The first two counts were upon bills of exchange, and stated that the defendant "promised the plaintiff to pay the same according to the tenor and effect thereof; but the defendant did not pay the same when due." The declaration also contained the common counts in debt, and concluded—"whereby an action hath accrued to the plaintiff to demand and have the said several monies respectively, &c.; yet the defendant hath not paid" &c. On demurrer—

are applicable to the indebitatus counts in debt.

Per Cur.—In the old form of debt upon a bill of exchange, the word "agreed" is used; but there is no substantial distinction between "promised" and "agreed." Besides, this declaration follows the forms given by the Courts in the New Rules, which are applicable to debt as well as assumpsit.

16. *Striking out Indorsements.*

MAYER v. JADIS, H. T. 1833. N. P. 1 M. & Rob. 247.

THE bills were drawn payable to the order of the drawer, who indorsed in blank. The next indorsement was by one Richardson, and then followed the plaintiff's indorsement. There was no count in the declaration stating an indorsement by Richardson.

After reading the bill, the Court allowed an indorsement to be struck out.

Denman, C. J., allowed the bills to be handed back and the indorsement to be struck out.

17. *Amendment.* See, also, tit. *Amendment.*

HIGGINS v. NICHOLS, H. T. 1839. B. C. 7 D. P. C. 551.

THE declaration alleged the acceptance in this form:—"And the said E. Alderson accepted the said bill payable at Thomas Smith's, King's Arms, Whitechapel, and not elsewhere." The defendant pleaded that he did not indorse the bill in manner and form &c. On comparing it with the declaration, it was found to agree in every respect, except that the words "and not elsewhere" were not in the bill. The defendant objected that the variance was fatal; and on an application to the under-sheriff to amend, he declined so to do.

The declaration, stating a bill as a special acceptance, is not supported if it be a general acceptance; but it may be amended.

Patteson, J.—I do not know whether the word "only" was intended by the Legislature to be necessary to make a special acceptance. However the intention may have been, I think that the words "and not elsewhere," alone, are sufficient to make this a special acceptance within the act; so that the word "only" is not necessary. But then the under-sheriff was bound to amend the record as to this variance.

18. *Common Counts.*

ATKINSON v. HAWDON, H. T. 1835. K. B. 2 Ad. & E. 628; S. C. 4 N. & M. 409.

DECLARATION on a bill of exchange. The second count was indebitatus assumpsit for goods sold and delivered, and upon an account stated. Plea, as to the 1st count, that the bill had been

The plaintiff may recover on the common

counts when the bill is vitiated by an alteration*.

altered in a material point, to wit, by altering the day of the date thereof from the 30th day of December, 1833, to the 28th day of December, 1833.

The Court held, on demurrer, that the alteration of a bill of exchange by the drawer in a material point, so as to avoid the bill, did not deprive him of the right to sue the acceptor upon the original consideration.

EALLES v. DICKER, Lent Ass. 1829. N. P. 1 *M. & Malk.* 324.

In an action by indorsee against acceptor, the bill is not evidence of money had and received by the acceptor to the holder's use.

THE plaintiff (indorsee) was unable to proceed on the count on the bill, in consequence of a variance in the mode of statement. It was, for the plaintiff, thereupon proposed to give the bill, which was admitted to be the defendant's acceptance, in evidence on the count for money had and received.

Littledale, J.—I am decidedly of opinion that the bill is not evidence of money had and received by the acceptor to the use of the holder.

EARLY v. BOWMAN, H. T. 1831. K. B. 1 *B. & Ad.* 889.

So, a bill of exchange, payable to a third person, is not of itself evidence of an account stated between payee and acceptor.

THE declaration by the payee against the acceptor contained counts on the bill and the money counts; the defendant having paid the balance due on the bill into Court on the latter counts—

Per Cur.—The question, whether or not the bill would be evidence of an account stated between the payee and the acceptor, need not be decided in this cause. The inclination of our minds would be to say, that it was not. The plaintiff, in his declaration, here alleges a reckoning to have taken place between the parties, on which the defendant was found debtor. The defendant admits this by paying money into Court on the account stated. At the trial, the only evidence of any demand, on the plaintiff's part, against the defendant was the bill. It being, therefore, agreed that a reckoning took place, and there being nothing but the bill to which that reckoning would apply, it seems to us reasonable to conclude that the reckoning was upon the bill.

CALVERT v. BAKER, M. T. 1838. Ex. 7 *D. P. C.* 17; S. C. 4 *M. & W.* 417.

And, where a bill payable generally was made payable at a particular place, without the acceptor's consent:—

Held, that his saying he was always ready to pay at his own residence, was not evidence of a subsisting

ASSUMPSIT by the plaintiff as indorsee of a bill of exchange, and upon an account stated, against the defendant as acceptor. Plea, to the first count, that the defendant never accepted the bill in that count in manner and form &c. The bill was accepted generally, and the addition, "payable at Williams, Deacon, & Co.," was afterwards made without the defendant's knowledge. In answer to a letter from the plaintiff, relative to the bill, the defendant's attorney answered—"Mr. Baker, (the defendant), of Bedbrooke, has placed in my hands your letter relative to the dishonour of a bill for 40*l.*; he never made it payable at Williams & Co.'s, or any other place in town, but refused to pay it otherwise than at his own house. The bill must, therefore, have been altered as to its acceptance; and he

* If a declaration contains a count on a bill, and the common counts on the consideration, and the plaintiff proves the consideration, he is entitled to a verdict on these counts, if stated in the particular of demand. (*Ryder v. Ellis*, H. T. 1838, N. P., 8 C. & P. 357).

will take such steps as the law will authorize. Mr. Baker has been prepared for payment, and the party will have his money by applying at Bedbrooke.”

debt, so as to establish an account stated.

The Court held, that this was no admission of 40*l.* being due to the plaintiff upon the account stated.

(i) PARTICULARS OF DEMAND.

COOPER *v.* AMOS, E. T. 1826. N. P. 2 C. & P. 267.

THIS was an action on a bill of exchange and for goods sold. The plaintiff's attorney had delivered a particular of his demand under a Judge's order, in which the demand for goods and the bill stated in the second count were specified, but, in the particular, the bill in the first count was not mentioned.

A bill or note need not be stated in the particulars of demand*.

Abbott, C. J.—If the bill is stated in the declaration it need not be mentioned in the particular.

(j) PLEAS.

1. *In Abatement.*

WILDE *v.* KEEP, H. T. 1834. N. P. 6 C. & P. 235.

ASSUMPSIT against “John K.” upon an acceptance, signed John K. & Co., which was proved to have been written by Joseph K., who had been in the habit of doing business in the name in which the acceptance was signed—

Describing defendant as “Joseph K.,” when his name is “John K.,” could only be taken advantage of by plea in abatement†.

The Court held, that, upon proof of Joseph having been arrested, it was sufficient, as there was no plea in abatement; but it would have been otherwise if the writ had been executed on John.

2. *In Bar.*

1st.—*In General.*

1. *Of the General Issue* ‡.

DONALDSON *v.* THOMPSON, H. T. 1840. Ex. 6 M. & W. 316; S. C. 8 D. P. C. 209.

IN an action by the indorsee against the maker of a promissory note payable on a certain day, the first count stated a promise to

1st count on a bill; 2nd ac-

* By Rule H. T., 1 Will. 4, it is ordered, that, with every declaration if delivered, or with notice of declaration if filed, containing counts in indebitatus assumpsit or debt on simple contract, the plaintiff shall deliver a particular of demand.

† But now, by Rule H. T., 2 Will. 4, where the defendant is described in the process or affidavit to hold to bail by initials, or by a wrong name, or without a Christian name, the defendant shall not be discharged out of custody, or the bail-bond be delivered up to be cancelled on motion for that purpose, if it shall appear to the Court that due diligence has been used to obtain knowledge of the proper name. A summons may be obtained to compel the plaintiff to amend.

‡ By rule H. T. 4 Will. 4, in all actions upon bills of exchange and promissory notes, the plea of non-assumpsit shall be inadmissible. In such actions, therefore, a plea in denial must traverse some matter of fact, as the drawing or making, or indorsing, or accepting, or presenting, or notice of dishonour of the bill or note.

count stated; there was only the general promise and breach:—Held, non-assumpsit could not be pleaded so as to include the 1st count.

pay according to the form and effect of the note, and that default was made in payment, whereby the defendant became liable to pay the amount. The second count stated, that, on a subsequent day, the defendant became indebted to the plaintiff in &c. on an account stated, and, in consideration of the premises, afterwards promised to pay the said several sums of money. Plea, non assumpsit. Special demurrer. The point marked for argument was, whether or not this action was brought upon a promissory note within the meaning of the Pleading Rules of Hilary Term, 4 Will. 4, which provides, that, "in all actions upon bills of exchange and promissory notes, the plea of non assumpsit shall be inadmissible." The Court thought the plea bad; and—

Per Parke, B.—This is an action by the indorsee against the maker; and upon looking into the books, I find that the promise is always implied. If the cause had gone to trial, the plaintiff need only have proved the note in order to support the issue raised by this plea. All this difficulty arises from departing from the form of declaration in the New Rules. The plea is clearly inadmissible.

SEWELL *v.* DALE, H. T. 1840. B. C. 8 D. P. C. 309.

And *Patteson, J.*, held, plaintiff might sign judgment for want of a plea.

DECLARATION on a bill of exchange, and the common counts. The defendant pleaded *nunquam indebtedatus* to the whole declaration. The plaintiff treated this plea as a nullity, and signed judgment as for want of a plea.

Patteson, J.—The plea in this case is a mere sham plea, pleaded in order to provoke a demurrer. I shall not set the judgment aside.

FRASER *v.* NEWTON, T. T. 1840. Ex. 8 D. P. C. 773.

But the Exchequer decided, the plea is not a nullity.

INDORSEE against acceptor of a bill of exchange. The declaration contained a count on the bill, and also a count for money due upon an account stated. The defendant pleaded to the whole declaration non assumpsit. The case of *Sewell v. Dale*, supra, was relied on, where it was determined that the plaintiff might sign judgment.

Sed per Cur.—You should sign judgment as to the first count, and enter a *nolle prosequi* as to the other.

ARMFIELD *v.* BURGIN, H. T. 1840. Ex. 8 D. P. C. 247.

So, to an action on a bill, defendant cannot plead never indebted, except as to the sum paid into Court.

DECLARATION in debt contained a count on a bill of exchange, and the common counts. Plea, payment of money into court generally, and never indebted as to the rest. Special demurrer, assigning for causes that the plea purports to answer the whole declaration, and is in fact an answer to part only; and that the plea is a plea of payment into court of the sum of 13*l.* 1*s.* 9*d.* in satisfaction of all the debts and causes of action in the declaration mentioned, except 20*l.* parcel thereof, whereas such debts together amount to 173*l.* 3*s.* 9*d.*, and, after deducting therefrom the said sum of 20*l.*, is a much larger sum than the said sum paid into court.

Per Cur.—The plea is clearly bad on special demurrer, but, in the special causes assigned, the defect is not pointed out; which is, that the plea of never indebted is improper to so much of the demand as consists of the bill of exchange. It is clear that you cannot

plead *nunquam indebitatus* to a count upon a bill of exchange. Where, in an action of debt on a bill of exchange, a sum of money is paid into Court less than the amount of the bill, the defendant should shew some answer as to part, and plead the payment into Court as to the residue; in which case the concluding averment in the plea of never indebted would become surplusage.

GILBERT *v.* PLATT, T. T. 1837. Ex. 5 D. P. C. 748.—S. C.,
by name of TIMMIS *v.* PLATT, 1 N. & P. 720.

DECLARATION on a promissory note, made by the defendant, payable to the order of the plaintiff's testator. The declaration, after stating the making of the note in the usual form, alleged a promise to the plaintiff as executor after the death of his testator. The defendant pleaded, that he did not promise *modo et formâ*. General demurrer.

But non assumpsit is a good plea to an action by an executor on a note payable to his testator, although the declaration alleges a promise to the plaintiff.

Per Cur.—The action is not upon the promise contained in the note, and that is the meaning of the rule. But, assuming this to be an action on the note, the rule says, that the plea must traverse some matter of fact, and that is done here by denying the promise to the executor; the rule is clear enough if taken altogether; it means that the implied promise cannot be traversed. Here it will be necessary to shew, as a matter of fact, a promise to the executor, and that may no doubt be traversed, not being a promise contained in the note itself. The rule is confined to actions upon the note itself—that is, where the sole cause of action is the making of the note. This declaration is not maintainable without proving an express promise to the plaintiff.

2. *Stamp, want of.*

DAWSON *v.* MACDONALD, M. T. 1836. Ex. 2 M. & W. 26.

To an action on a bill of exchange, the defendant had obtained a Judge's order for leave to plead—first, that the acceptor did not accept the bill; secondly, that the defendant did not indorse it; and, thirdly, that the bill was drawn upon paper not duly stamped, according to the rules of the commissioners of stamps made under the authority of 3 & 4 Will. 4, c. 97. On motion to strike out the last plea—

If there be pleas denying the acceptance, indorsements, &c., a plea that the bill was improperly stamped will be struck out;

Per Cur.—Rule absolute. It would create great doubt as to what is put in issue by these pleas if we were to allow them as several and distinct.

HAWARD *v.* SMITH, T. T. 1838. C. P. 4 Bing. N. S. 684; S. C.
6 Scott, 438.

To an action on a bill of exchange the defendant pleaded, it was not properly stamped. On special demurrer—

it is a bad plea.

The Court held, that the plea could not be supported.

3. *Denying Acceptance and making.*WORLEY *v.* HARRISON, T. T. 1835. K. B. 5 N. & M. 173.

A plea, denying the making of the supposed promissory note in declaration, when the latter describes a special memorandum, is bad on demurrer.

THE plaintiff declared upon a certain agreement or instrument in writing, whereby the defendant promised to pay 50*l.* by several instalments of 5*l.* on several days mentioned; but it was declared by the instrument, that it was intended by the parties to the note of hand, that all installed payments should become void on the death of the plaintiff. Plea, that the defendant did not make the said supposed promissory note, in the said first count mentioned, in manner and form as the plaintiff hath in the said first count alleged. On demurrer—

The Court held, that this was not a promissory note, but an agreement; and that a plea by the defendant, that he did not make the said supposed promissory note, was bad on special demurrer.

ALLEN *v.* WALKER, H. T. 1837. Ex. 2 M. & W. 317; S. C. 5 D. P. C. 460.

In an action by indorsee against indorser, a plea that defendant did not "make or draw" the bill, is good in substance, but bad in form.

THE plaintiff declared in assumpsit against the defendant, as indorser of a bill of exchange, drawn by a third person, indorsed to the defendant, and by him to the plaintiff. Plea, that the defendant did not make or draw the said bill of exchange, as in the said first count is alleged. The plaintiff signed judgment. On motion to set it aside—

Per Cur.—The plea is bad in point of form; but, as every indorser is in law a drawer, the plea is good, if the declaration be considered with that view; and you cannot treat it as a nullity. That can only be done when no sense can be made of the plea.

4. *Denying drawing and indorsing.*WATERS *v.* THANET, EARL OF, H. T. 1839. C. P. 7 D. P. C. 251; S. C. 7 Scott, 181.

Second indorser against drawer: plea, denying indorsement to first indorser, is the same as pleaded *modo et forma*.

THE defendant obtained an order to plead that he did not make the bills, and that he did not indorse them; and the pleas were so drawn accordingly. It was contended that the traverse should have contained the words "manner and form."

Tindal, C. J.—Supposing the defendant had pleaded that he did not indorse the bill *modo et forma*, what difference would there have been between that and the plea which is on the record? The mode adopted was not that in which an indorsement was usually traversed; but the defendant followed the terms of the order, which amounted to a simple traverse of the indorsement "in manner and form."

GILMORE *v.* HAGUE, M. T. 1835. K. B. 4 D. P. C. 303.

But a party who has negotiated a bill with the drawer's name in-

RULE to shew cause why the defendant should not be allowed to plead, with other pleas, that the drawer of the bill of exchange on which the action was brought did not indorse the bill to the plaintiff. The defendant was sued as acceptor; and it was now sworn

by the plaintiff that the defendant had negotiated the bill in question three years ago, bearing at the time the indorsement of the drawer, and had represented the drawer to be a respectable person living in *Savoy Street*, in the *Strand*. The bill had been dishonoured at maturity; and a letter giving notice to the drawer, and which had been sent to the address furnished by the defendant, had been returned through the post-office—"gone away."

Per Cur.—The defendant ought not to be permitted to deny the drawer's indorsement, as he had admitted it when he negotiated the bill, and the plaintiff was now without the means of proving it.

dorsed cannot plead a denial of the indorsement.

5. *Notice of Dishonour—want of.*

CLARKE *v.* WILSON, E. T. 1837. Ex. 3 M. & W. 208.

In assumpsit against the defendant as joint maker of a note—plea, that the defendant joined in it merely as surety, of which the plaintiff had notice; and that, although it had been due for six months, the defendant had no notice of its not having been paid until the commencement of the action, and that the plaintiff gave time to the party without the defendant's knowledge or consent. On general demurrer—

The Court were of opinion that the plea was bad, and could not be sustained.

A plea, that the defendant was a joint maker and surety only, and that he had no notice of default until six months after that event, is bad.*

2nd.—*In particular.*

1. *Accord and Satisfaction.*

LEWIS *v.* LYSTER, M. T. 1835. Ex. 2 C., M. & R. 704; S. C. 1 Tyr. & G. 185; S. C. 4 D. P. C. 377.

To an action on a bill of exchange by an indorsee against the acceptor, the defendant pleaded that after it became due the defendant gave to the holders a bill for a larger sum, and that they accepted it in satisfaction of the first bill, and afterwards indorsed it to one F. S., to whom the money was afterwards paid in satisfaction of that bill, and of all damages sustained by the plaintiff by reason of its non-payment, and that the indorsement to the plaintiff of the first bill was after the second bill had been given; but the plea did not allege that the second was negotiable. On special demurrer—

The delivery of a bill in satisfaction of another dishonoured one may be pleaded as a discharge, if negotiable.

Per Cur.—We think the plea would have been good, if it had stopped with that part of it where the payment is averred; but the plea further alleges that the sum was paid in satisfaction of the first bill, which was not indorsed to the plaintiff till after it was due, and after the then holders had accepted the money in satisfaction. The judgment must be for the defendant.

LUMLEY *v.* MUSGRAVE, M. T. 1837. C. P. 4 B. N. S. 9; S. C. 3 Scott, 230.

A BILL of exchange in the hands of the plaintiff's testator, the indorsee, was dishonoured when due. After an interval of some

Where interest is due on a bill, and another is

* A plea, that the defendant had not "notice from the plaintiff of the non-payment," does not preclude the plaintiff from shewing notice was given by another party. (*Newen v. Gill*, H. T. 1838, N. P., 8 C. & P. 367).

taken in lieu and paid, it cannot be pleaded as an accord and satisfaction as to the interest.

months, a renewed bill was given for the amount of the old one, which always remained in the possession of the indorsee, and which renewed bill was paid before the commencement of the suit. In an action by the plaintiff to recover interest upon the old bill, and a plea that the defendant and indorsee had agreed that the renewed bill should be given and accepted in full satisfaction and discharge of all demands arising out of the old bill—

The Court held that the plaintiff was entitled still to sue on the first for the interest due on it, and that the facts did not establish an agreement alleged in the plea, that the acceptance of the latter discharged the defendants from such interest.

CRISP v. GRIFFITHS, E. T. 1835. Ex. 3 D. P. C. 752.

So, a plea that a bill was given for a larger amount, in lieu of a note, is bad.

IN debt by payee against maker—plea, that after the cause of action accrued to the plaintiff, he drew a larger bill for and on account of the note declared on, and accepted and delivered it to the plaintiff, who took it on account of the said note, and that he afterwards indorsed it away. Replication, that the defendant neglected to pay the note of his own wrong, and without the cause alleged in the plea. On special demurrer—

The Court held that the plea was insufficient, as shewing only a suspension of the remedy, and not an extinction of the original debt, and nothing stated equivalent to an averment that the bill was given and accepted in satisfaction of the note.

BAKER v. JUBBER, E. T. 1840. C. P. 1 Scott, N. S. 26; S. C. 8 D. P. C. 538.

So, a plea that defendant accepted a bill drawn on him for 60*l.*, being an accord and satisfaction, is not proved by shewing that he gave a blank acceptance, which, when produced, had been filled up for 46*l.*

IN an action of assumpsit the defendant pleaded that the plaintiff drew, and he accepted a bill for 60*l.*, in satisfaction of the plaintiff's demand. The evidence proved that the defendant transmitted to the plaintiff a blank acceptance for 60*l.*, which it appeared was subsequently filled up by the plaintiff for 46*l.*

Per Cur.—The defendant has taken upon himself to say that the plaintiff drew a bill upon him for 60*l.*, which he accepted. It appears by the correspondence which took place, that the plaintiff requested the defendant to send him up a bill for such an amount as he thought correct, adding—"we can draw here." What was sent up was a blank acceptance, with the amount only named; and at the time of its transmission there had been no drawing of the bill at all, for there were none of the terms of an instrument of that kind used. The plaintiff drew the bill for 46*l.* only. How, then, can that be said to be a drawing of a bill by the plaintiff for 60*l.*, which the defendant accepted?

BRADBURY v. EMANS, M. T. 1839. Ex. 5 M. & W. 595; S. C. 7 D. P. C. 849.

In an action by second indorsee against acceptor, it is a frivolous plea to state that the acceptor gave

To an action on a bill of exchange by the indorsees against the acceptor, the defendant pleaded, that, after the bill had been indorsed to the plaintiffs, and before he had notice of such indorsement, he gave another bill to the drawer by way of renewal, and in lieu of the first-mentioned bill; and that "he had not, before or at the time he accepted and gave the said bill first in the plea men-

tioned as aforesaid, or at any time before the commencement of this suit, any notice that the said bill of exchange had been indorsed to the said plaintiffs, as in the declaration alleged; and the said defendant did not then, nor until after the same became due, know that the plaintiffs were the holders of the said bill." On motion to set aside the plea as frivolous—

Per Cur.—The defendant is apprehensive that the plaintiff will take issue on his plea, and therefore pleads it in such a manner that it cannot be traversed. We feel no doubt as to the power of the Court to interfere, where the plea affords no answer whatever to the action; but as cases of a similar kind are pending in another Court, and a uniformity of practice is desirable, we have had an opportunity of consulting those Judges, and think the rule *should* be made absolute.

another bill in payment to the drawer, without notice that the plaintiff was the holder.

2. *Action prematurely brought.*

SIGGERS *v.* LEWIS, T. T. 1834. Ex. 1 C., M. & R. 370; S. C. 4 Tyrw. 847; S. C. 2 D. P. C. 681.

ASSUMPSIT AGAINST the indorser of a bill of exchange. Plea, that the action was commenced before a reasonable time had elapsed for the defendant to pay the bill, after notice to him of non-payment. On demurrer—

Per Cur.—The plea is bad. The contract of the drawer is, that the acceptor shall pay the bill; and until notice of the acceptor's default is given to the drawer, no action can be maintained against him. If, upon notice being given, the money is not paid, the action is maintainable immediately. That moment the cause of action arises; and if the action is improperly brought, notwithstanding a tender of the money, the course is to apply to a Judge to stay the proceedings.

The defendant cannot plead that the action was brought before a reasonable time had elapsed after notice of dishonour.

3. *Alteration.*

COCK *v.* COXWELL, T. T. 1835. Ex. 2 C., M. & R. 291; S. C. 4 D. P. C. 187.—S. P. CALVERT *v.* BAKER, M. T. 1838. Ex. 4 M. & W. 417; S. C. 7 D. P. C. 17.

INDORSEE against the defendant, as acceptor. The defendant pleaded that he did not accept the bill; the defendant proved that Hawkes, the drawer, had altered the date of the bill from the 5th December to the 15th December; it was also proved that it was an accommodation bill, as between the defendant and the drawer. It was objected, on the part of the plaintiff, that evidence of alteration of the date was not admissible upon the plea of non-acceptance.

An alteration of a bill or note may be taken advantage of under a traverse of the acceptance.

Per Cur.—The plea is, that the defendant never accepted the bill upon which the plaintiff has declared, and which he produced in evidence; that is, that he never accepted the altered bill; and we think it cannot be said that he ever did accept the altered bill.

SIBLEY *v.* FISHER, M. T. 1837. Q. B. 2 N. & P. 430.

DECLARATION on a bill of exchange by indorsee against his indorser. Pleas, denying all the indorsements, the due presentment,

But, under the pleas denying

indorsement, presentment, and notice of dishonour, the plaintiff is not bound to explain an alteration.

and notice of dishonour, and alleging want of consideration. The bill, when produced, purported to have been drawn on December 10th, 1836, but appeared to have been altered to December 15th. It was contended, on the part of the defendant, that it was incumbent upon the plaintiff to explain this alteration—

Sed per Cur.—We think, that, upon these pleadings, he was not bound to do so. The only questions raised by this record are as to the indorsements, the presentment, the notice of dishonour, and the consideration. The bill is, therefore, admitted, and the admission appearing on the record, it was not incumbent upon the party producing it to give any explanation of the alteration.

LANGTON *v.* LAZARUS, H. T. 1840. Ex. 5 M. & W. 629.

A plea that, before the bill became due, the date was altered:—Held, a bad plea, for not shewing it was after acceptance.

ASSUMPSIT by indorsee against acceptor of a bill of exchange. Plea, that, “whilst the bill was in full force and effect,” the date was altered; not stating the alteration to have been made after acceptance, or without the consent of the defendant. Demurrer, assigining for causes, that the plea is an argumentative denial of the acceptance of the said bill of exchange; that it does not allege that the said alteration was made *after* the said acceptance; that the words, “whilst the said bill was in full force and effect,” in the plea, are ambiguous; and that, for all that appears in the plea, the defendant might have been a consenting party to the said alteration.

By the Court.—Leave to amend, by stating the alteration to have been made after acceptance, and without consent.

4. *Bankruptcy**.

5. *Collateral Security, Note given as.*

BARTRUM *v.* CADDY, E. T. 1839. Q. B. 1 P. & D. 207.

A plea that a note had been given as a security for a debt, which debt had been paid and the note returned to the proper party, is a good plea.

To a declaration on a promissory note the defendant pleaded, that, certain persons being in debt, and their creditors requiring security, the defendant agreed to indorse a note drawn by them, to be deposited as a security; that it was accordingly made and indorsed, and deposited as a security; that, afterwards, the money was paid, and the note was re-delivered to the makers, one of whom fraudulently indorsed it to the plaintiff. Upon a general demurrer to this plea—

Per Cur.—The whole argument is, that there is no express allegation that the note was paid. This is on general demurrer; and if there be a substantial allegation of payment and satisfaction of the note, it will do. The plea states that the note was given to secure a particular debt of 200*l.*, and afterwards that that sum was paid, and the note delivered up to the makers. We think that that is a substantial averment that the note was satisfied. If so, there is an end to all argument.

* The defendant may plead that the plaintiff has been twice a bankrupt, and not paid 1*5s.* in the 1*l.*, and that the bill vests in the assignees. (*Mackay v. Wood*, H. T. 1841, Ex., 9 D. P. C. 278; S. C. 7 M. & W. 420).

6. *Company illegally associated.*RANSFORD *v.* COPELAND, E. T. 1837. K. B. 1 N. & P. 671.

IN an action of assumpsit by one of the public officers of a banking company on a bill of exchange, the defendant pleaded that the company consisted of more than six persons, and that they were illegally associated together, and carried on trade for the purpose of borrowing and taking up money on their bills or notes, payable on demand, during the continuance of the privilege granted by 3 & 4 Will. 4 to the Governor and Company of the Bank of England; and the replication traversed that they were illegally associated, or carried on trade modo et formâ.

The Court held, that the allegation in a plea, that the plaintiffs were a banking company consisting of more than six persons, and that they were illegally associated during the privileges granted to the Bank of England by 3 & 4 Will. 4, c. 98, as being compounded of law and fact, was therefore traversable.

The defendant may plead that the plaintiffs, a banking company, consist of more than six persons and are illegally associated, which raises a question of law and fact.

7. *No Consideration.*CURZON *v.* HODGES, E. T. 1836. Ex. 5 D. P. C. 98.

ACTION on a bill of exchange. On motion to discharge a defendant out of custody, on the ground that the debt for which he has been arrested is founded on an illegal consideration—

Lord Abinger, C. B.—When it clearly appears that the process of the Court has been obtained for the purpose of oppression, we shall be ready to grant relief; but the Court will not try upon affidavit the want or illegality of the consideration of a promissory note.

Want of consideration must be pleaded; the Court will not interfere on motion.

LOW *v.* CHIFNEY, M. T. 1834. C. P. 1 Bing. N. S. 267; S. C. 1 Scott, 95.—S. P. TRINDER *v.* SMEDLEY, T. T. 1835. K. B. 5 N. & M. 138.—S. P. GRAHAM *v.* PITMAN, T. T. 1835. K. B. 5 N. & M. 37.—S. P. STOUGHTON *v.* KILMOREY, E. T. 1835. Ex. 3 D. P. C. 705.—S. P. EASTON *v.* PRATCHETT, H. T. 1835. Ex. 1 C., M. & R. 798; S. C. 3 D. P. C. 549; S. C. 4 Tyrw. 492.—S. P. HOMAN *v.* THOMPSON, E. T. 1835. N. P. 6 C. & P. 717.

THE indorsee brought an action against the defendant as acceptor of a bill of exchange; the latter pleaded, that such acceptance was a matter of accommodation; and that no consideration passed from the drawer. Upon demurrer—

Per Cur.—The plea is bad; there is but a simple allegation, that there was no consideration passing from the drawer to the acceptor. There is no imputation of mala fides; it is not affirmed that the party was cheated; it is merely said that it is an accommodation bill, which may originate in the fairest transaction in the world. As it appears to us, we should be breaking in upon all general rules, more especially upon that which takes it for granted that an indorsement imports primâ facie a consideration, if we were to interfere in the manner required by the defendant.

A general plea of no consideration

REYNOLDS *v.* IVEMEY, H. T. 1835. Ex. 3 D. P. C. 453.

for the accept-
ing or paying
the bill:—Held,
bad on special
demurrer;

IN an action by an indorsee against the acceptor of a bill of exchange, a plea that there was not at any time any consideration for his the said defendant's acceptance, or paying the said bill of exchange. On special demurrer—

Lord *Abinger*, C. B.—We must take the plea to mean, that the acceptor had had no consideration.

Judgment for the plaintiff.

EASTON *v.* PRATCHETT, H. T. 1835. Ex. 1 C., M. & R. 798; S. C. 4 Tyrw. 472; S. C. 3 D. P. C. 472.—S. P. ADAMS *v.* JONES, M. T. 1840. K. B. 4 P. & D. 174.

but cured by
verdict.

To a declaration by indorsee against the drawer of a bill of exchange the defendant pleaded, that he indorsed the bill without having or receiving any value or consideration whatever for or in respect of the said indorsement thereof, and that he had not at any time had or received any value or consideration whatever for or in respect of such indorsement. On a motion to enter up judgment, non obstante veredicto—

The Court held, that after verdict the plea was sufficient; though it would have been bad on special demurrer.

STOUGHTON *v.* KILMOREY, (Earl of), E. T. 1835. Ex. 3 D. P. C. 705.

To make the
plea good, it
must shew af-
firmatively how
the considera-
tion is defec-
tive;

To an action on a promissory note the defendant pleaded that he had made the note without any consideration. Upon special demurrer—

The Court said, all the benefit intended by the new Rules would be lost, if we were to allow such a plea as the present. The plea ought to have shewn how there was no consideration. The plea ought to contain affirmative matter.

UTHER *v.* RICH, T. T. 1840. Q. B. 2 P. & D. 579.—S. P. FRENCH *v.* ARCHER, M. T. 1834. C. P. 3 D. P. C. 130.

and state the
mala fides.

ASSUMPSIT by indorsee against drawer. Plea, that the bill had been indorsed to L. for the specific purpose of getting it discounted, and paying the proceeds to the defendant, and that L. had fraudulently and covinously delivered it to H, and that the latter was never “a bonâ fide holder for valuable consideration,” and that the defendant had never received any value from L., or from H., or from the plaintiff.

The Court held, that mala fides must be distinctly alleged; and that the words, “that the plaintiff was not the bonâ fide holder,” were not equivalent to such an allegation, and that fraud could not be given in evidence under it; if the allegation of fraud had stood alone, it would not have raised an issue of fraud.

PEARCE *v.* CHAMPNEYS, M. T. 1834. Ex. 3 D. P. C. 276.

Plea, no con-
sideration;
replication,

To a declaration on a promissory note against the maker, he pleaded no consideration; the plaintiff replied, that the note was indorsed to her in part payment of a debt, and that she had no notice of the

premises in the plea. The defendant rejoined that she had notice. On demurrer—

Parke, B.—It is a principle of law that pleadings are to be taken most strongly against the party pleading them. The judgment must be for the plaintiff.

value, and no notice; rejoinder, plaintiff had notice; demurrer:—Held, that plaintiff was entitled to judgment.

DEACON *v.* STODHART, M. T. 1839. C. P. 5 *B. N. S.* 594; S. C. 7 *Scott*, 763.

To a count against the acceptor of a bill of exchange the defendants pleaded, that they accepted the bill payable at their bankers; that, when the bill became due, it was duly presented at the bankers, who then honoured and paid the same, according to the usage of merchants in that behalf; and further, that the bankers afterwards lost the bill, and it came to the plaintiff's hands without value or consideration.

A plea, that the bill was paid by the acceptor's bankers, when due, who lost it; and that the plaintiff took the bill without giving value;

The Court held, that the first allegation was an informal allegation of payment, and bad for uncertainty; and that the plea was also bad for duplicity.

JONES *v.* JONES, E. T. 1840. Ex. 6 *M. & W.* 84.

DEBT by the payee against maker of a promissory note payable on demand. Plea, that the note was given as and for the purchase-money to be paid to the plaintiff, for the sale to the defendant of certain land, by virtue of an agreement made between the defendant and the plaintiff for the sale of the said land, and that the said contract was not, nor was any memorandum or note thereof, in writing, signed by the defendant, or any other person lawfully authorized by him, and that there was not any consideration or value for the making or payment of the said note, except as aforesaid.

or that no value was given; the note being for the purchase of an estate of which there was no contract, according to the Statute of Frauds—it is a bad plea;

On general demurrer, the Court held the plea bad, inasmuch as it did not appear that the plaintiff had refused to execute a conveyance of the land, or that the defendant had not had possession; and, consequently, the plea did not shew a total failure of consideration.

CRESSWELL *v.* WOOD, T. T. 1839. K. B.. 10 *Ad. & E.* 460.

THE plaintiff having persuaded G., the defendant's son-in-law, to become bail for H., on an undertaking to indemnify him against all consequences; and G. having been sued on the bail-bond, the plaintiff obtained a stay of proceedings on payment of debt and costs, and the defendant accepted a bill to enable the money to be raised by discounting: the plaintiff having brought an action on the bill, to which the defendant pleaded that it was accepted for the plaintiff's accommodation, and the jury having found that issue for the defendant—

but would be good after verdict.

The Court held that it might be sustained, although the plaintiff might not have been liable on his verbal undertaking to indemnify, being after verdict.

FINLEYSON *v.* MACKENZIE, T. T. 1837. C. P. 3 *B. N. S.* 824.

INDORSEE against acceptor of a bill. Plea, as to part, *actio non*, because he received no consideration, but had delivered it to a third person to get it discounted, from whom the plaintiff detained it for his own debt, and only advanced the part admitted; and issue

So, a plea that defendant delivered the bill to A. to be discounted, who

delivered it to plaintiff, who detained it for a debt due to him, and only gave out the difference:—Held, a bad plea.

joined, that the defendant was indebted beyond that sum, which was found for the defendant. On motion for judgment, non obstante veredicto—

The Court held, that this is a bad plea, and that it would, on special demurrer, be held to be a violation of the general rule, that, in actions upon bills of exchange, whether in debt or in assumpsit, this, which was the general issue, should be inadmissible in law; but, as the parties have thought proper to join issue, (although the defendant has violated the general rule), and go down to trial upon a certain allegation—a proposition perfectly substantial—he cannot now be allowed to turn round on this plea, and by raising this objection disturb the verdict.

THOMPSON *v.* CLUBLEY, H. T. 1836. Ex. 1 *M. & W.* 212.

But, the defendant may plead, that bill was accepted for the accommodation of the plaintiff, and that all the parties had put their names without consideration.

INDORSEE against acceptor of a bill of exchange drawn by H. R. Plea, that the said bill of exchange was wholly made by the said H. R., at the request and for and by way of accommodation of the plaintiff, and was accepted by the defendant at the request of the said H. R. for the plaintiff's accommodation, and at the time of the making and accepting of the said bill, it was agreed between the said parties, that, if the said bill should happen to be outstanding at the time when it became due, it should be taken up and paid by the said plaintiff, and that no claim or demand should at any time be made against the said defendant or the said H. R. upon or in respect of it. The plea was proved in evidence—

And the Court held, that this defence was clearly admissible, inasmuch as it shewed that the acceptance was, in truth, for the accommodation of the plaintiff; and that all the parties put their names to the bill without consideration.

8. *Consideration, Failure of.*

WELLS *v.* HOPKINS, H. T. 1839. Ex. 5 *M. & W.* 7.

A plea, that the bill was indorsed for hops according to sample, and that no hops according to sample, "or any hops whatever," had been delivered, is a good plea.

To an action by the indorsee against the drawer of a bill of exchange the defendant pleaded, that the bill was given in payment of the price of seventeen pockets of hops, sold by the plaintiff to the defendant as hops of a certain grower, and answering certain samples to be delivered by the plaintiff to the defendant within a reasonable time; that, although a reasonable time had elapsed, the plaintiff had not delivered to the defendant any hops answering the samples, or any hops whatever; and that there was no consideration for the bill except as aforesaid. Replication, *de injuriâ*. It appeared, that the plaintiff had delivered seventeen pockets of hops, but inferior to the samples.

The Court held, that the general allegation in the plea, that the plaintiff had not delivered any hops whatever was immaterial, and might be rejected; and that, without it, the plea shewed a total failure of consideration, and was an answer to the action:—Held, also, that, if the plaintiff relied on the defendant's acceptance of the inferior hops, he ought to have replied it.

WILSON *v.* SEARLE, M. T. 1838. Ex. 4 *M. & W.* 795.

So, a plea, that the bill was

To a declaration in debt on a promissory note for 24*l.*, dated 3rd January, 1837, made by the defendant payable twelve months after

date to the plaintiff, the defendant pleaded, that one J. W., before and at his death, was indebted to the plaintiff in 2*l.* for goods sold, which sum was due to the plaintiff at the time of the making of the promissory note in the declaration mentioned; that the plaintiff, at the time J. W. was dead, applied to the defendant for payment; whereupon, in compliance with his request, the defendant, after the death of J. W., for and in respect of the debts so remaining due to the plaintiff as aforesaid, and for no other consideration whatever, made and delivered the note to the plaintiff; and that J. W. died intestate; and that at the time of making and delivering of the note no administration had been granted of his effects, nor was there any executor or executors of his estate, nor any person liable for the debt so remaining due to the plaintiff as aforesaid; and the defendant averred that there never was any consideration for the said note except as aforesaid.

given for a debt due from a deceased person, the declaration stating no consideration for the promise, is a good plea.

On error, the Court held, that this plea was a good answer to the declaration; where it did not appear on the face of the record that the maker of the note was wife to the deceased, reversing the judgment, *non obstante veredicto*, which had been entered on the record by the Court below.

TRICKEY *v.* LARNE, H. T. 1840. Ex. 6 *M. & W.* 278; S. C., *by name of* PRIQUET *v.* LARNE, 8 *D. P. C.* 174.

To an action on a bill of exchange for 20*l.* 8*s.* 6*d.* defendant pleaded, that it was agreed between him and plaintiff, that plaintiff should do certain carpenter's work for the sum of 63*l.*; that defendant paid to plaintiff 43*l.* on account of the work, and accepted the bill for the residue. That plaintiff neglected to do certain part of the work, and did other part in an unworkmanlike manner, and that the sum of 43*l.*, paid on account, was more than the value of the work done. After verdict—

But, a plea, that the bill was given in payment of work, from which no benefit was derived;

Per Cur.—The bill is stated to be given for the residue of the consideration, besides the 43*l.* It ultimately turns out that the plaintiff is not entitled to recover more than 43*l.*; but that is no answer, unless the plea shews a total failure of consideration for the bill.

CONNOP *v.* HOLMES, M. T. 1835. Ex. 2 *C., M. & R.* 719; S. C. 1 *Tyrv. & G.* 85; S. C. 4 *D. P. C.* 451.

ASSUMPSIT on two bills of exchange; indorsee against drawer. Plea, that the plaintiff agreed to advance the money to the acceptor, on terms of taking part in money and part in goods, and that the latter were never delivered. Replication, *de injuriâ*. On demurrer, assigning for causes that the replication is no answer to the plea, and neither traverses nor confesses and avoids the same; and also, that nothing is put in issue by the said replication. And for that it concludes to the country, &c.

or, that the plaintiff was to advance part of the bill in goods, and part in money, and that he did not deliver the former, is bad, as not answering the whole count.

Per Cur.—Supposing the replication to be bad on that ground, the plea is also bad. It is pleaded to the action brought on two bills of exchange, which the plea alleges were given in pursuance of an agreement by the plaintiff to advance money; we must assume that the money was paid, in the absence of any averment to the contrary.

MIDDLETON *v.* CHAMBERS, E. T. 1840. C. P. 1 *Man. & G.* 97; S. C. 1 *Scott, N. S.* 99; S. C. 8 *D. P. C.* 545.

Plea, that the bill was given for business done as an uncertificated attorney. The business was done in K. B.; plaintiff had ceased to be an attorney of that Court, but had been admitted in C. P.:—Held, that the plea was no answer.

To an action on a bill of exchange the defendant pleaded, that the acceptance was given for business done by an uncertificated attorney; it appearing that, having by neglect to take out a certificate for more than a year in K. B. ceased to be an attorney of that Court, he had applied to be admitted of the C. P., and was admitted on his articles; and upon affidavit of his original admission, and of being then an attorney of K. B.—

The Court held that it was to be taken as an original admission in C. P., and not a re-admission; and that the non-payment of the duties at the time of such admission did not make it void under the Stamp Acts; and therefore the plea was no answer.

9. Duress.

STEPHENS *v.* UNDERWOOD, T. T. 1838. C. P. 4 *Bing. N. S.* 655; 6 *Scott, 402*; S. C. 6 *D. P. C.* 737.

A plea, that the acceptance was obtained by duress, and no consideration, is bad, on demurrer, for duplicity.

DECLARATION against acceptor of a bill of exchange. Plea, that before and at the time of making the acceptance, the defendant was unlawfully imprisoned by the plaintiffs, and others in collusion with them, and was then and there detained in prison, until, by the force and duress of the said imprisonment, he made the said acceptance; and that he never had any value or consideration for the said acceptance, or for paying the said bill of exchange, or any part thereof respectively. Verification. Special demurrer.

Per Cur.—The plea is double; two grounds of defence, duress and want of consideration, are put forth as the justification for the non-payment. In answer to the objection, it is said that the plea is not bad for duplicity, because, in consequence of its being inartificially pleaded, it would be bad on special demurrer. Now, admitting, as we do admit, this to be the case, does it therefore follow as a conclusion of law, that because one defence is bad, the plea is not, therefore, double?

10. Forgery.

REYNOLDS *v.* ROBERTSON, M. T. 1840. K. B. 3 *P. & D.* 611.

Plea, that the bill was given upon the faith of a bill of lading, which turned out to be forged, is a bad plea.

THE defendants, who were commission agents at Liverpool, were in the habit of receiving bills of lading from K., in Ireland, of goods consigned to Liverpool, against which K. drew bills, and the defendants accepted them. On depositing the bill of lading and the bill of exchange with the plaintiff's bankers at Dublin, their course of business was to make advances thereupon, and to remit the bill of exchange for acceptance to the defendants, accompanied by the bill of lading indorsed by themselves. On one occasion the plaintiffs discounted a bill as usual, on receiving a bill of lading, and remitted them to the defendants, who accepted the bill of exchange; but the bill of lading turning out to be a forgery by K., defendants refused to pay their acceptance.

The Court held that they were liable upon it to the plaintiffs, who were indorsees for valuable consideration.

11. *Fraud.*

NOEL *v.* RICH, T. T. 1835. Ex. 2 C., M. & R. 360; S. C. 4 D. P. C. 228.

DECLARATION on a bill of exchange; indorsee against drawer. Plea, that it was accepted for the defendant's accommodation; that he indorsed it in blank, and delivered it to Lewis L. to be discounted for his benefit; that Lewis L. had fraudulently delivered it to Lawrence L., as a security for a debt owing from Lewis L. to Lawrence; and that the plaintiff, who had received it through several indorsements from Lawrence L., had notice. Replication—*de injuriâ*.

Per Cur.—The substantial defence is, that the defendant was a party to the bill without receiving any consideration; but every fact stated by him may be true, and yet it may be true that he had a good and sufficient consideration for the bill, and that Lewis Levy paid him the amount, after all the transactions stated in the plea. All he says is, that the bill was not discounted for him by Lewis Levy, according to his undertaking. Perhaps, on the old plea of the general issue, that might have been sufficient *primâ facie* evidence to cast on Lewis Levy the obligation of shewing that he gave consideration; but, in pleading, the party must allege all that substantially amounts to a defence. Here he does not do so; and on that ground, it appears to us that the plea is bad.

A plea, alleging that bill was delivered by a third party, to be discounted, and that it was fraudulently indorsed by him, must allege that the defendant never received value;

BRAMAH *v.* ROBERTS, H. T. 1835. C. P. 1 *Bing. N. S.* 469; S. C. 1 *Scott*, 354; S. C. 3 D. P. C. 392.—S. P. *PRESCOTT v. Low*, H. T. 1835. C. P. 3 D. P. C. 403.

To an action by an indorsee against acceptors, the defendants pleaded no value for the acceptance, and that it had been negotiated by fraud.

The Court held, that, as an indorsee was *primâ facie* to be presumed to hold it for consideration, and the Court could not presume a notice which would make him a fraudulent agent in taking it, the plea was not a sufficient answer.

and notice of the fraud must be stated; it cannot be presumed.

12. *Insanity**

13. *Limitations, Statute of*†. As to *Notes payable on demand*, see ante, p. 293.

HUNTLEY *v.* SANDERSON, E. T. 1833. Ex. 1 *Cr. & M.* 467.

S. & Co., the owners of a ship of which H. was captain, despatched the latter to Miramichi, with instructions to purchase a

A promise to indemnify a

* Under a plea that defendant did not make the note, a question of insanity cannot be raised. (*Hanson v. Richardson*, Sum. Ass. 1835, N. P., 1 M. & Rob. 504).

† As upon a bill drawn payable at or after sight, there is no right of action till presentment; without such presentment the statute does not begin to run. (*Holmes v. Kerrison*, 2 Taunt. 323). If a note be payable at a certain period after sight, (*Sturdy v. Henderson*, 4 B. & Al. 492; *Sutton v. Toomer*, 7 B. & C. 416; *Holmes v. Kerrison*, 2 Taunt. 323; and see *Dixon v. Nuttall*, 1 C., M. & R. 307), the statute runs from the expiration of that period after the exhibition of the note to

surety who attaches his name to a bill, as regards the Statute of Limitations, runs from the damnification.

cargo of timber and draw upon them for the amount. H. proceeded to Miramichi accordingly, and there purchased some timber from one L. for 154*l.* 11*s.* 11*d.*, and drew a bill upon S. & Co. for the amount at sixty days' sight, in favour of the seller or his order. The bill was dated 4th September, 1826; and on the 21st November it was duly presented for acceptance, and protested for non-acceptance. The plaintiff was in Liverpool, with the ship under his command, from October, 1826, until 1827. It was not proved that the plaintiff received any notice of the dishonour of the bill, either from the then holder, or from the defendants, who had got the cargo. In 1832 the plaintiff was arrested upon this bill at Miramichi, and paid it, in order to release himself from the arrest. In a special action of assumpsit brought by the plaintiff against the defendants, for not paying the bill, for not accepting it, and for not damnifying the plaintiff from all loss, &c., sustained by him from having drawn the bill. Plea, Statute of Limitations.

The Court held, that the promise to indemnify was the promise which the law would imply; and as there was no damnification until 1832, the Statute of Limitations did not apply.

BURLEIGH *v.* STOTT, E. T. 1828. K. B. 8 *B. & C.* 36; S. C. 2 *M. & Ry.* 93.

A part payment by one of several makers of a note "joint and several,*"

UPON a note made jointly and severally by a party, and another as surety only, the former, within six years, made a part-payment, after which the latter died, having never had any communication with the payee from the time of signing the note—

The Court held, that it did not differ from the case of a joint note; and that a part-payment by one was, in legal effect, an admission by both that the note was unsatisfied, and operated as a new promise by all and each of the parties to pay according to the nature of the instrument.

PEASE *v.* HIRST, M. T. 1829. K. B. 10 *B. & C.* 122.

or payment of interest by one of several joint makers of a note,

SEVERAL parties joined as sureties with the principal in a note to his bankers, who carried it to the account in his pass-book, and charged him with interest on it yearly; upon a change of partners in the banking firm, and a balance struck between the old and new firm, the note was handed over, but not indorsed, to the new firm.

The Court held, that payment of interest by one of the joint promisors was sufficient to take it out of the Statute of Limitations.

the maker. But if a bill or note be payable on demand, the words "on demand" are held not to constitute a demand a condition precedent, but merely to import that the debt is due and payable immediately; or, at any rate, an action is sufficient demand. Therefore, on a bill or note payable on demand, the statute runs from the date of the instrument, and not from the time of the demand. (*Christie v. Fensick*, 1 S. N. P. 137).

* Entries on the bill of payment of interest or principal, in the handwriting of the plaintiff, were formerly evidence to take the debt out of the statute; but now the 9 Geo. 4, c. 14, s. 3, enacts, that no indorsement or memorandum of any payment, written or made after the 1st January, 1829, upon any promissory note, bill of exchange, or other writing, by or on behalf of the party to whom such payment shall be made, shall be sufficient proof of such payment, so as to take the case out of the operation of the statute.

REW v. PETTET, E. T. 1834. K. B. 1 *Ad. & E.* 196; S. C., *by name of CREW v. PETIT*, 3 *N. & M.* 456.

IN an action on a promissory note, it appeared, that the defendants, as churchwardens and overseers in 1813, signed notes for monies borrowed by the parish under order of vestry, and payment of interest had been made within six years by order of vestry, and entered in the overseer's book of disbursements, and allowed and signed, amongst other parishioners, by one of the defendants.

Per Cur.—There is no doubt that the period of limitation is gone by; the only question is, whether any thing has occurred to take the case out of the statute. There was a payment of interest by the parish, and it was a question for the jury, whether the defendants, or any of them, had adopted such payments. We think there is no reason to doubt upon the case. The parties to the note describe themselves as churchwardens and overseers, and by this they seem to us to recognize the vestry as *managers* of the business—to recognize the vestry as their *agents* for this purpose.

or where paid by overseers for the time being, takes the note out of the Statute of Limitations.

DICKINSON v. HATFIELD, M. T. 1831. N. P. 1 *M. & Rob.* 141.

THE bill of exchange was proved; and then, to take the case out of the statute, the plaintiff produced a letter from the defendant, in which he promised to pay "the balance due from him to the plaintiff," but did not specify any particular amount.

Per Lord Tenterden, C. J.—I think that, under the 9 Geo. 4, c. 14, the letter produced is evidence of a new or continuing contract at the time of its date, and will entitle the plaintiff to a verdict. The act does not require the amount of the debt to be specified. Before it passed, a verbal promise to pay the balance would have entitled the plaintiff to recover. A similar promise in writing will have the same effect since. But, I think, he can only recover nominal damages; the promise is only to pay a balance, and there is no evidence to shew what the balance is.

A letter, promising "to pay the balance" without naming it, entitles the plaintiff to nominal damages.

GALE v. CAPRON, E. T. 1834. K. B. 1 *Ad. & E.* 102; S. C. 3 *N. & M.* 863.

THE defendant pleaded a plea of set-off, stated that the plaintiff made his note payable to A. C., after whose death it was by her administrator duly indorsed to the defendant, and was unpaid. Replication, that the said supposed debt on the said note did not accrue within six years:—

Held, that the replication admitted the note and indorsement; and that, before Lord *Tenterden's* act, proof of indorsement of interest by the holder within six years was sufficient to bar the Statute of Limitations. And, even supposing an action had been brought by the indorsee of the administrator of the payee against the present plaintiff, and he had pleaded the statute, would it not have been an admission of the indorsement by the administrator?

An acknowledgment to a prior holder enures to the benefit of a subsequent.

HOLLIS v. PALMER, E. T. 1836. C. P. 2 *Bing. N. S.* 713.

DECLARATION on a promissory note payable on demand with interest, dated the 26th July, 1819, alleged, that the defendant had not paid either the testator in his lifetime, or the executrix since his death, the amount of the said note, and interest, or any part thereof,

A plea to a declaration alleging payment of interest up to within six years,

that the action did not accrue within this period, is good.

except interest on the said note, at the rate of 5*l.* per cent., from the day of the date of the said note, up to a certain day within six years next before the commencement of the suit. Plea, that the defendant did not pay the interest in the declaration mentioned, or any part thereof, within six years next before the commencement of this suit to the said testator in his lifetime, in manner and form as the plaintiff hath above in that behalf alleged. Upon special demurrer—

The Court held, that the plea was good, and that judgment should be for the defendant, inasmuch as the payment of interest within six years &c., set forth in the declaration, was not of itself a cause of action, but a species of evidence, which was to be referred to a jury, and not decided by the Court.

HUBER *v.* STEINER, T. T. 1834. C. P. 4 *M. & Scott*, 328.

After plea pleaded, defendant was allowed to add a plea, that where the plaintiff and defendant were domiciled there was a limitation of action.

AFTER the general issue and Statute of Limitations pleaded in an action on a note made abroad, the Court allowed a plea, that, in the country where the plaintiff and defendant were domiciled at the date of the note, a similar legal provision limiting suits thereon existed, to be added.

14. *Partnership.*

WILSON *v.* BAILEY, M. T. 1840. C. P. 9 *D. P. C.* 18; S. C. 2 *Scott*, N. S. 115.

One of several defendants may plead, that the bill had been accepted without his knowledge for a debt before he became partner.

THREE partners being sued on a bill of exchange accepted in the name of the firm, one of them pleaded, that it was given in respect of a debt which had accrued before he became a partner. It appeared, that the contract on which the debt arose was made before he became a partner, but that the performance of a part took place after he became a partner.

Per Cur.—The question is, whether this acceptance was given for anything before the partnership, and not for anything done during the partnership. It appears, that the consideration for the bill was, the use and hire of horses and gigs, and the contract for hiring was entered into during the old partnership, but the time for which a horse and gig so hired was used was partly during the existence of the new partnership. How, then, can the defendant say in his plea, that it was accepted for and in respect of a debt, the whole of which was due and owing from the other defendants, before he, Lewis, became partner? It appears to us, then, that the defendant has failed in making out his plea.

15. *Payment.*

LEDIARD *v.* BOUCHER, T. T. 1835. N. P. 7 *C. & P.* 1; S. P. SHIRLEY *v.* JACOBS, T. T. 1835. C. P. 4 *D. P. C.* 136; S. C. 2 *Scott*, 157; 2 *Bing. N. S.* 88.

Before Rule 1 Vict.,* payment in reduc-

DECLARATION on a bill of exchange, and a count for use and occupation. In support of the count for use and occupation, the

* By Rule, T. T. 1 Vict., it is ordered, in any case in which the plaintiff (in order to avoid the expense of a plea of payment) shall have given credit in the particulars of his demand for any sum or sums of money, therein admitted

defendant proposed to give in evidence a rent-book, by which it appeared, from entries in the plaintiff's handwriting, that the defendant had at various times paid the plaintiff different sums of money for rent, so as to reduce the amount of rent to 15*l.* For the plaintiff, it was objected that this evidence was not receivable under the plea of the general issue. Since the Rules of H. T. 4 Will. 4, the general issue, in an action for use and occupation, merely puts in issue the fact of the occupation, and payment must be specially pleaded; the object of the Rules being, that the plaintiff should be informed of the real defence intended to be set up.

Lord Denman, C. J.—I shall receive the evidence. I take the Rule of H. T. respecting payment to mean a complete payment, which is an answer to the action; and not a partial payment, which merely goes to the amount of the damages.

tion of damages need not have been pleaded;

COOPER *v.* MORECRAFT, E. T. 1838. Ex. 3 *M. & W.* 500.

DECLARATION in debt. Pleas—as to all but 5*l.* (which was the sum claimed by the particulars) *nunquam indebitatus*; as to 5*l.*, a set-off for work and labour, and money paid. At the trial before the sheriff, the defendant offered evidence that money had been paid by him to the plaintiff on account of the debt. The plaintiff's counsel objected to such evidence, on the ground that it was not receivable under the plea of set-off, nor in reduction of damages, this being an action of debt. (*Belbin v. Butt*, 2 *Mee. & Wels.* 422).

unless the form of action had been debt.

Per Cur.—This is not a set-off, which implies a right to a cross action, but a payment on account of the plaintiff's demand, and therefore inadmissible in evidence under these pleadings.

16. *Release.*

DOD *v.* EDWARDS, E. T. 1827. N. P. 2 *C. & P.* 602.

INDORSEE against acceptor of a bill. It appeared that the drawer of a bill payable to his own order, before it was indorsed, gave the acceptor a general release. This was contended to be an answer to the plaintiff's action—

A release by drawer to acceptor is no answer to an action against acceptor, unless the plaintiff, the indorsee, knew of the release.

Sed per Lord Tenterden, C. J.—You must shew that the plaintiff knew it; if you cannot shew that the plaintiff was aware of the release, your defence fails. If it were not so, you would put an end to the circulation of bills.

17. *Renewal; that Bill or Note was to be renewed.*

BYASS *v.* WHITE, H. T. 1835. Ex. 1 *C., M. & R.* 686; *S. C.* 5 *Tyrr.* 377; *S. C.* 3 *D. P. C.* 524.

IN an action by drawer against acceptor, plea, an agreement that the plaintiff should consign goods to N., and direct him to pay out

Plea, that a bill should be paid

to have been paid to the plaintiff, it shall not be necessary for the defendant to plead the payment of any such sum or sums of money. But this rule is not to apply to cases where the plaintiff, after stating the amount of his demand, states that he seeks to recover a certain balance, without giving credit for any particular sum or sums. Payment shall not in any case be allowed to be given in evidence of reduction of damages or debt, but shall be pleaded in bar.

out of certain proceeds, or renewed; then stating a refusal to renew, and another agreement:—Held bad on special demurrer*.

of the proceeds to the defendant the amount of the bill; and in case of the proceeds not having arrived at the time of the bill falling due, that the plaintiff should renew it: it then stated that the proceeds had not arrived; the plaintiff's refusal to draw another bill; but that it was agreed that the defendant should write to N., relinquishing all claim to have paid him any part of the proceeds, and directing the whole to be paid to the plaintiff; and then averred that he had not received any consideration for the payment by him of the bill. On special demurrer—

The Court held the plea bad, for repugnancy between the commencement and conclusion; but leave given to amend.

18. *Scotland; Defendant discharged according to Law of.*

WOODHAM *v.* EDWARDS, M. T. 1836. K. B. 1 N. & P. 207.

To an action on a bill made in England, a plea, in substance, that, according to the law of Scotland, defendant was discharged, is no answer to an action in England.

IN assumpsit against the acceptor, plea, that after, &c., the defendant was resident in Scotland, and executed an assignment of his personal property for the benefit of his creditors, and notice thereof to the plaintiff, who authorized his attorney, by writing, to concur in such deed, and receive his dividend—alleging such proceedings to be in conformity with the law of Scotland; and that, by reason of the premises, and by force of the laws there, he was absolutely discharged.

The Court held—first, that, by taking issue on such plea, the law of Scotland was put in issue, and the defendant bound to give evidence of it; and, secondly, that no deed of composition having been executed by the plaintiff, nor any act done binding him not to sue his debtor, there was nothing on the face of the plea amounting to a defence according to the laws of this country.

19. *Set-Off.* See, also, tit. *Bankrupt.*

STEIN *v.* YGLESIAS, M. T. 1834. Ex. 1 C., M. & R. 565; S. C. 5 Tyrw. 173; S. C. 3 D. P. C. 252.

Indorsee against acceptor. Plea, that, before indorsement, the acceptor was indebted in a larger sum to the indorser:—Held a bad plea.

INDORSEE against acceptor of bills payable to A. D. Plea, that the bills were indorsed after they became due and payable, and that, before the indorsement, the said A. D. was indebted to the defendants, upon the balance of an account between them, in a large sum of money, exceeding the amount of the bills of exchange. Demurrer—

The Court said, that *Burrough v. Moss*, (infra), decided the plea to be bad.

BURROUGH *v.* MOSS, H. T. 1830. K. B. 10 B. & C. 558.

So, on a note given to the wife, indorsed by the hus-

THE defendant gave to the husband a note payable to the wife or order, which the husband, after it was due, indorsed to the plaintiff.

* To an action by payee against maker of a note, the defendant pleaded, it was to be renewed on certain terms; and if the plaintiff takes issue on it, the defendant may prove the agreement, though it is a bad plea. (*Holt v. Miers*, 1839, N. P., 9 C. & P. 191).

The Court held, that, as the husband had a right to treat it as separate property, and had done so by indorsing it, no set-off could be maintained by the maker in respect of a debt due from the wife *dum sola*.

band, there can be no set-off of a debt *dum sola*.

20. *Spiritual Persons; that Bill was indorsed by, contrary to 57 Geo. 3.*

HALL v. FRANKLIN, H. T. 1838. Ex. 3 M. & W. 259.

THIS was an action brought against the defendant, as drawer and indorser of a bill of exchange, by George Hall, as one of the public officers of certain persons united in co-partnership for the purpose of carrying on business as bankers in Manchester and elsewhere, by the name and description of the Northern and Central Bank of England, under and by virtue of, and according to the form and effect of the statute of 7 Geo. 4, c. 46, for "The better regulating Co-partnerships of certain Bankers in England." The defendant pleaded, that the bill of exchange was made and indorsed, and delivered to the plaintiff, and the promise in the declaration mentioned was made by the defendant after the passing of the statute intituled "An Act to consolidate and amend the Laws relating to Spiritual Persons holding of Farms, and for enforcing the residence of Spiritual Persons on their Benefices, and for the support and maintenance of Stipendiary Curates in England." That two persons, of the names of Richard Barnett and Rowland Blaney were spiritual persons, and were partners concerned in the carrying on the said co-partnership or banking company; that the said trade is carried on as well for the gain and profit of the said two spiritual persons, as of the several other persons concerned. That the indorsement and delivery of the bill by the defendant to the said co-partnership were and are a contract made by the defendant with the said co-partnership, so including and comprehending these two spiritual persons, in the way of their trade or business of a banker, as well for their gain and profit, as for the gain and profit of the several other persons, members thereof; and the same with respect to the promise—contrary to the form of the statute. To this plea the plaintiff demurred.—

Before 1 Vict. c. 10*, a plea, that a banking company was composed of spiritual persons, who traded contrary to the 57 Geo. 3, and as such indorsed the bill, was good.

Per Cur.—The question arises upon the construction to be given to the statute of 57 Geo. 3, c. 39, s. 3, which enacts, "That no spiritual person shall by himself, or by any other person for himself, or to his use, engage in or carry on any trade or dealing for gain or profit, or deal in any goods, wares, or merchandizes, by buying and selling for lucre, gain, or profit in any market, fair, or other place, upon pain of forfeiting the value of such goods, wares, and merchandizes; and that every bargain or contract so made by him, or by any to his use, in any such trade or dealing, contrary to this act, shall be utterly void and of none effect." The defendant contends, that the contract is made void by the act of Parliament, inasmuch as spiritual persons are forbidden to trade, and the act has made void all bargains and contracts made by them in any such trade or dealing; that, whether the co-partnership consists of many or few members makes no difference; that

* Which makes contracts by banking firms valid, though spiritual persons be partners.

these two spiritual persons are equally interested with the others; and that if this action can be maintained, so it might, even if the two spiritual persons were the only partners in the concern. And this was hardly contested by the counsel for the plaintiff: but he contends that banking is not a trade or business in contemplation of the act of Parliament; that the statute of 57 Geo. 3 was intended to consolidate the laws respecting spiritual persons, not to enlarge them; and that this 3rd section was intended to re-enact the 5th and 6th sections of the statute of 21 Hen. 8, c. 13. The 3rd section enacts, "That no spiritual person shall by himself, or by any other for himself, or for his use, engage in or carry on any trade or dealing for gain or profit, and that every bargain or contract so made by him, or by any for his use, in any such trade or dealing, contrary to this act, shall be utterly void and of none effect." The words in the latter part of the section, "such trade or dealing," appear to refer to the words "trade or dealing" in the early part of the section. In that part of the section which is copied from the statute of Hen. 8, although the word "deal" is to be found, the word "trade" is not. The part of the clause which is copied from the statute of Hen. 8, except for the purpose of forfeiting the things bought and sold, and bought with intent to sell, might have been omitted altogether. We have been strongly pressed with the inconveniences that may result from this construction of the statute. We are not insensible to them, but the only proper effect of that argument is, to make the Court cautious in forming its judgment. We cannot on that account put a forced construction on the act of Parliament.—Judgment for the defendant.

21. *Stock-Jobbing.*

ROBSON *v.* FALLOWS, H. T. 1837. C. P. 3 *Bing. N. S.* 392; *S. C.* 4 *Scott*, 43.

A plea, that the plaintiff received the bill for stock-jobbing differences, need not state the exact price of the stock, nor the date of the settling day.

THE defendant, the acceptor of a bill of exchange, pleaded, that the bill, of which he was the accommodation acceptor, was indorsed by the drawer, without consideration, to a third party, who deposited it with the plaintiff as a security upon certain and unlawful wagers and contracts relating to the future prices and value of certain stock and public securities, to wit, Spanish Cortes Bonds, &c., whereby the payment of certain monies to the plaintiff was made to depend on the future prices of said stock; and that, if the price thereof should be less than 67*l.* 7*s.* 6*d.* for the 100*l.* in the said stock at certain times, to wit, the month of June, in the year aforesaid, the third party should pay the plaintiff the difference which might then be between the said respective prices; but if the price of the said stock should be more than the said specified price, then the plaintiff should pay the difference or excess. On the trial, it appeared that the price of the stock at a future day was to be 67*l.* 2*s.* 6*d.*, not, as alleged, 67*l.* 7*s.* 6*d.*—

The Court held—first, that such difference between the allegation and the proof did not amount to a variance, the plea being substantially supported by proof of the smaller sum; secondly, that it was not necessary to allege the date of the settling day, time not being of the essence of the contract, as it is in actions for usury.

22. *Surety; Defendant only liable as.*

SMITH v. WINTER, H. T. 1838. Ex. 3 M. & W. 309; S. C. 6 D. P. C. 386.

ASSUMPSIT on three promissory notes. Plea, that the defendant made the notes in the first three counts mentioned, at the request and for the accommodation of one John Innes, without any value or consideration for paying the amounts thereof, and that there never was any value for the indorsements in those counts mentioned; of all which the plaintiffs had notice at the time of the indorsement to them. And that before, and at the time of forbearing and giving day of payment, as thereafter mentioned, the plaintiffs held the said notes as securities for the payment of money by Innes, as principal debtor to them; and that defendant then was liable (if at all liable) to the plaintiffs upon the said notes only collaterally and as a surety for Innes, and not otherwise, of which the plaintiffs, at the time of forbearing and giving day of payment, had notice; and that, after the notes were indorsed to the plaintiffs, and before the same, or any of them, had become due and payable, and before the commencement of the suit, to wit, &c., the plaintiffs, without the knowledge, privity, consent, or authority of the defendant, forbore and gave day of payment to Innes for a long space of time, to wit, for a space of time which did not expire until twelve months and upwards after the said notes became due and payable, of a large sum of money, to wit, 17,000*l.*, then owing from Innes to them, and as collateral securities only, and not otherwise, for the payment of parts whereof by the said John Innes, they, the said plaintiffs, then, to wit, &c., held the said notes. Replication to this plea, that the plaintiffs did not, without the knowledge, privity, consent, or authority of the defendant, forbear and give day of payment to the said John Innes in manner and form, &c.

A defendant may plead that "if liable, he is only responsible as a surety;" and that time was given to his principal without his consent.

Per Cur.—We must construe the plea so as to make it good, if we can do so. It must be taken to mean, therefore, that at no time before the notes were due was there any consent by the defendant to the enlargement of time and forbearance given to Innes. In that view of it, the plea was not proved; if it be taken to mean, that, at the time only when the agreement was made, no consent was given by the defendant, then the plea would be bad, as not excluding the subsequent time before the notes became due, within which time, according to the case of *Mayhew v. Crickett*, (2 Swanst. 189), a consent would be sufficient. The law, therefore, seems to be, that if the defendant, at any time before the notes became due, gave her consent, she would still remain liable. Here she did give her consent before the notes became due. The plea, therefore, was not proved; and the verdict must be entered for the plaintiffs.

23. *Tender.*

POOLE v. TUNBRIDGE, H. T. 1837. Ex. 2 M. & W. 223.

To an action by an indorsee against the acceptor of a bill of exchange, the defendant pleaded, that, after the bill became due, he tendered the amount of the bill with the interest, and had always

The acceptor cannot plead that, after the

bill became due, he tendered the principal and interest;

been ready and willing since that time to pay the same; concluding with a profer in Curiam. On special demurrer—

Per Cur.—This is a bad plea. The declaration states the contract to be, that the defendant promised to pay the plaintiff the amount of this bill according to its tenor and effect, and of the said acceptance and indorsement; and the law is correctly stated therein, that the plaintiff has a right of action by virtue of the indorsement. If a person accepts a negotiable instrument, though he cannot find the holder, he must suffer the consequences. He was bound to pay a precise sum on a stated day, and must do so. The meaning of a plea of tender is, that the party has always been ready to perform his part of the contract; and his contract, in the present case, is to pay on a certain day. Nothing will answer that contract but his being ready to pay *on the day*.

WAIN v. BAILEY, M. T. 1840. Q. B. 2 P. & D. 507.

or, he was ready and willing to pay the note on being produced and delivered up to him.

IN an action against an acceptor, plea, that the defendant was ready and willing to pay the bill on being produced and delivered up to him—

The Court held, the plea no answer to the action.

24. *Time; that it was given.*

HALL v. COLE, H. T. 1836. K. B. 6 N. & M. 124.

The defendant may plead that time was given to an antecedent party by taking from him a cognovit.

THE plaintiff, an indorsee, in his declaration against the defendant, a prior indorser, described S., his immediate indorser, as one and the same person as the drawer. Plea, that, after the dishonour, the plaintiff took a cognovit from S., by which longer time was given than would otherwise have been required for obtaining judgment in the action—

The Court held the plea a good defence, although it was not expressly averred that the plaintiff knew that the person from whom he took the cognovit was also the drawer.

LYON v. HOLT, T. T. 1839. Ex. 5 M. & W. 250.

And if a plea states that time was given by A., indorsee of a bill, and the indorsement be material, it must be proved.

To a declaration by the indorsee of a bill of exchange, alleged to have been indorsed by the drawer to the defendant, by the defendant to W., and by W. to the plaintiff, the defendant pleaded, that the bill was indorsed by the defendant to H. for his accommodation, and without consideration; that H. indorsed it to W.; that the alleged indorsement by the defendant to W., in the declaration mentioned, was the said indorsement by the defendant to H., and by him to W.; and that, after the bill became due and was dishonoured, the plaintiff and H. stated an account respecting this and other dishonoured bills, on which H. was liable to the plaintiff, and agreed to take from W. renewed bills in lieu of them, and not to press any parties for payment of the original bills during the currency of the latter; and averred that the substituted bills were accordingly drawn and accepted and delivered to the plaintiff, without the defendant's knowledge or consent; and that the plaintiff gave time thereby to the parties in the original bills. At the trial, the agreement alleged

in the plea was proved in substance, but it appeared that H. did not indorse the bill to W.

The Court held, that this indorsement was a material part of the defence, since, unless H. was a party liable on the bill, the agreement between the plaintiff and H. was not such a giving of time as to discharge the defendant; and, therefore, that the plea was not proved, and the plaintiff was entitled to a verdict.

25. *In Trover.*

HILTON v. SWAN, E. T. 1839. C. P. 5 B. N. S. 413; S. C. 7 D. P. C. 417.

TROVER for a bill of exchange. Plea, that the plaintiff being possessed of the bill indorsed it in blank; that, by virtue of such indorsement, R. became the holder, from whom the defendant, believing that he was lawfully possessed, and had authority to dispose of the bill, took it as a pledge or deposit for an existing debt. Replication, alleging that the defendant had notice, and well knew, at the time of receiving the bill, that R. had no right or authority to deposit the bill. On demurrer—

Per Cur.—The plaintiff is entitled to judgment on the demurrer to his replication. We entertain a very great doubt with regard to the plea; we think it a very arguable matter, whether the plea is not in substance and form bad. It does not allege that R. was the lawful owner of the bill; it does not say that he had any authority at all to lodge or deposit the bill. The ground on which we give our opinion is, that the replication takes issue on a point material between the parties. What is the real point in dispute between the parties? Is it not, whether the defendant had notice or knowledge of the defective title of R.? and this was put in issue by the replication.

3. *Joinder of Pleas.*

BEAVAN v. TURNER, M. T. 1840. Ex. 8 D. P. C. 870.

To an action by payee against maker, motion was made to plead—1st, a traverse of the making of the note. 2nd, a traverse of the indorsement to the plaintiff. 3rd, that the note was obtained by fraud, and that plaintiff took it with knowledge of the fraud. 4th, that the note was given for the accommodation of the payee, and indorsed by him to the plaintiff, with notice, and without consideration. 5th, set forth a collateral agreement, on the terms of which the payee held the note; that the payee, contrary to good faith, indorsed it to the plaintiff, who took it, with notice of the terms on which it was held by the payee, and without consideration. 6th, that the note was given by the defendant to payee, to indemnify him against any loss that might arise on the sale of a certain landed estate; that no loss had arisen, and that there was no consideration for the indorsement of the note by the payee to the plaintiff. 7th, stated other facts, shewing fraud, and want of consideration for the making of the note, and that the plaintiff was a party to such fraud; and that the indorsement to him was without consideration. 8th,

In trover; plea, that the plaintiff indorsed the bill in blank, and that A., who became the holder, pledged it for a debt to the defendant. Replication, that the defendant knew A. had no right to pledge it:—Plaintiff is entitled to judgment.

Several pleas, varying the want of consideration, will not be allowed.

that there was no consideration for the making of the note; and that it was indorsed to the plaintiff after it became due, without the defendant's authority. 9th, that the note was given to the payee for a special purpose only, and that it was afterwards indorsed to the plaintiff contrary to such purpose, in fraud of the defendant, and without consideration. 10th, that the note was given for a debt erroneously supposed to be due to the plaintiff from a certain party other than the defendant; and that it was subsequently indorsed without consideration.

Per Cur.—The seventh plea is a mere amplification of the third; and the defendant must elect between the sixth and ninth. The words, "and without consideration," must be struck out of the fifth plea, otherwise it is the same as the sixth. Rule accordingly.

4. *In further Maintenance.*

LEE v. LEVY, T. T. 1825. K. B. 4 B. & C. 390; S. C. 6 D. & R. 475; S. C. 1 C. & P. 553, 675.

Matters arising after action brought must be pleaded in bar of its further maintenance, and not in bar generally.

Two actions were simultaneously commenced by one plaintiff against the acceptor and indorser of a bill; and before judgment against either, the plaintiff took a warrant of attorney from the acceptor for the payment of debt and costs by instalments, all of which were to be paid before judgment could have been obtained against him. This defence was made under the plea of the general issue.

Per Cur.—The jury found that the warrant of attorney was given by the acceptor without the privity of the defendant. That is immaterial; for as it was not given till after the commencement of the suit, it forms no answer to the action on this plea. It was decided in *Evans v. Prosser*, (3 Term Rep. 188), and confirmed in *Le Bret v. Papillon*, (4 East, 502), that no matter of defence arising after action brought can properly be pleaded in bar of the action generally, but should be pleaded in bar of the further maintenance of the action.

5. *Amendment of.*

BRAMAH v. ROBERTS, H. T. 1833. C. P. 1 Bing. N. S. 481; S. C. 1 Scott, 364.

Where pleas of fraud and no consideration were held defective on demurrer, the Court refused to allow an amendment without affidavit of merits.

IN an action against the defendants, as acceptors of a bill of exchange, plea, alleging that no consideration passed from the indorsee, and fraud. Replication, averring generally, that the bill was indorsed for good and valuable consideration—namely, monies advanced to the indorsers, and due by them to the indorsees. On demurrer, the Court held the replication good, but the plea bad; and the plaintiff had judgment. On motion for leave to amend—

Per Cur.—The general rule is, that a party who demurs will not be allowed after argument to withdraw the demurrer and plead; and the Court will not make an exception to the rule, where it appears to them that the decision upon the demurrer is just, according to the facts, without an affidavit of merits.

(k) REPLICATIONS.

1. *De Injuriâ.*

JONES *v.* SENIOR, T. T. 1838. Ex. 4 *M. & W.* 123; S. C. 6 *D. P. C.* 701.—S. P. SCHILD *v.* KILPIN, E. T. 1841. Ex. 9 *D. P. C.* 803.

PLEA, in an action by the holder against the acceptor that the bill was accepted in part payment of a larger debt from the defendant to the drawer, and that, before it became due, the defendant being in embarrassed circumstances, he entered into a composition with his creditors, to which the drawer was a party, and averred payment of the composition and receipt thereof in satisfaction of all claims in respect of the bills or otherwise. Replication, *de injuriâ*. Demurrer, that the replication purports to deny the excuse set up by the plea, where no excuse for non-payment of the bills when due is alleged, and though the plea shews matter in discharge of an undenied liability, and breach of promise to pay, according to the tenor and effect of the bills and indorsements; because it assumes that the material matters of the plea are merely in excuse, although those matters do not as pleaded appear, nor are, by any matters alleged in the replication, shewn to be merely matter in excuse.

The Court held that *de injuriâ* can only be replied to matter of excuse, and not in discharge. Leave to amend.

To an action on a bill, *de injuriâ* can only be replied to matter of excuse, and not discharge.

ISAAC *v.* FARRAR, H. T. 1836. Ex. 1 *M. & W.* 65; S. C. 1 *Tyrw. & G.* 281; S. C. 4 *D. P. C.* 750.—S. P. NOEL *v.* RICH, T. T. 1835. Ex. 2 *C., M. & R.* 360; S. C. 4 *D. P. C.* 228.—S. P. GRIFFIN *v.* YATES, E. T. 1834. C. P. 2 *Bing. N. S.* 579.

DECLARATION by indorsee against maker of a note. Plea, that the defendant made the note, and delivered it to one C. A., who undertook to procure him a sum of money for it, but did not do so, and committed a gross fraud upon him; that the note was indorsed to the plaintiff without consideration; and that no consideration passed from the other parties to the note, who, as well as the plaintiff, were all cognizant of the fraud. Replication, *de injuriâ*. On demurrer—

Per Cur.—On this demurrer to the replication, two objections were made—first, that its form was improper, as the inducement of *de injuriâ*, &c., was inapplicable to an action of *assumpsit*; and, secondly, that it was bad, because it was multifarious, and put in issue several distinct facts, each of which would, if disproved, be decisive of the action. We think the replication is good, notwithstanding these objections, the plea not denying the promise in the declaration, but excusing the performance of it.

Hence, to a plea that bill was delivered to a party to be discounted, and fraudulently indorsed by him,

WATSON *v.* WILKS, T. T. 1836. K. B. 5 *Ad. & E.* 237.

ASSUMPSIT on a promissory note and on an account stated. Second plea, that the promissory note was made by the defendant, and delivered to the plaintiff for and in consideration of certain money and goods then agreed by the plaintiff to be thereafter lent

or to a plea, that "a note was given for goods to be thereafter sup-

plied, and that plaintiff had not supplied them," the plaintiff may reply *de injuriâ**.

and advanced, and supplied to him, the defendant. And the defendant further saith, that the plaintiff did not nor would, at any time after the agreement, and the making and delivery of the said note, lend and advance, or supply to the defendant, the said money and goods so agreed to be lent, advanced, and supplied as aforesaid, nor any or either of them, or any part thereof, but hath wholly refused, though often requested by the defendant, so to do; nor hath the defendant received any other consideration whatever for the said promissory note, and this he is ready to verify &c. Replication, that the defendant broke his promise as in the first count of the declaration mentioned, without the cause by the defendant in his second plea in that behalf alleged; conclusion to the country. Special demurrer, shewing cause, that, instead of the general denial in the replication contained, it ought to have traversed or denied, or to have confessed, and avoided some one or more of the facts stated in the plea in express words; and also, that the replication, if meant as the general replication *de injuriâ suâ propriâ*, is informally pleaded, inasmuch as it omits to state that the cause of action arose of the defendant's own wrong; and, also, for that such general replication *de injuriâ &c.*, is not the proper replication in an action on promises, &c.

Lord *Denman*, C. J.—We think that this question has been already decided in favour of the sufficiency of the replication. *Vide ante*, 361.

CRISP *v.* GRIFFITHS, E. T. 1835. Ex. 3 D. P. C. 752.

But, to a plea, that a bill was given in lieu of a note, *de injuriâ* cannot be replied.

IN debt by payee against maker. Plea, that after the cause of action accrued to the plaintiff, he drew a larger bill for and on account of the note declared on, and accepted and delivered it to the plaintiff, who took it on account of the said note; and that he afterwards indorsed it away. Replication, that the defendant neglected to pay the note of his own wrong, and without the cause alleged in the plea. On special demurrer—

The Court held, that, although the plea was bad, the replication could not be sustained, being inapplicable to the plea, and not putting the matter contained in it in issue.

REYNOLDS *v.* BLACKBURN, M. T. 1837. Q. B. 6 D. P. C. 19; S. C. 7 Ad. & E. 161.

Where a plea was bad for duplicity, and also the replication was bad, being *de injuriâ*:—Held, that the replication was not aided, because the plea was double.

INDORSEE against acceptor. Plea, that defendants accepted the bills for the accommodation of Thomas Tempest, the drawer, without receiving any value or consideration for the said acceptances, or either of them, of which the plaintiff then had notice. And the said defendants further say, that, after the bills were indorsed, and before they became due and payable, and before the commencement of this suit, the said T. T., the drawer, gave and delivered to the plaintiff, who then accepted from the said drawer, divers other bills of exchange for divers large sums of money, in the whole exceeding the amount of the said sums mentioned in the said bills in the said declaration mentioned, to wit &c.; and it was on that occasion agreed by and between the said drawer, T. T., and the plaintiff, that

* Or that the acceptance was for a gaming debt, and before indorsement plaintiff had notice. (*Humphreys v. O'Connell*, H. T. 1841, Ex., 7 M. & W. 370; S. C. 9 D. P. C. 213).

the said plaintiff, in consideration of the premises, should forbear to sue him, the said drawer, upon the said bills in the said declaration mentioned, or either of them, for a long time, to wit, for three months, and until default should be made in the payment of the said bills, so delivered by the said T. T., the drawer, to the said plaintiff, in payment of the said bills in the said declaration mentioned. And the defendants further say, that the said bills were so delivered and accepted in payment of the said bills in the said declaration mentioned; and the said agreement was so made by and between the plaintiff and the said T. T, as aforesaid, without the knowledge, privity, or consent of the said defendants, or any of them. Replication, *de injuriâ*. Demurrer to the replication—

Lord Denman, C. J.—If the replication is bad for duplicity, that is occasioned by the necessity of replying to the defendants' bad plea, and cannot be taken advantage of but on special demurrer; but it does not make the replication good.

2. *To a Plea that Acceptance was special.*

LYON *v.* WALLS, H. T. 1833. C. P. 9 *Bing.* 660; S. C. 2 *M. & Scott*, 736.

To a declaration on a bill of exchange, the defendant pleaded that the acceptance was qualified, and that, according to the statute &c., "he accepted it payable at &c. only, to wit, and not otherwise or elsewhere." The plaintiff replied, that the acceptance was a general acceptance, and that he did not, in the acceptance, express that he had accepted it payable at &c. only, in manner and form; without traversing the "not otherwise or elsewhere."

The Court held it sufficient; and that the defendant should have negatived any demand at the particular place of acceptance alleged.

Plea, that the acceptance was special; replication, that it was general, without traversing that it was "not otherwise or elsewhere:"—Held, sufficient.

3. *To a Plea of Accord and Satisfaction.*

SARD *v.* RHODES, H. T. 1836. Ex. 1 *M. & W.* 153; S. C. 1 *Tyrv. & G.* 298; S. C. 4 *D. P. C.* 743.

ASSUMPSIT by indorsee against acceptor of a bill for 43*l.* Plea, that, after the bill became due, Parish made his note for 44*l.*, and delivered it to the plaintiff, which he accepted in full discharge and satisfaction. Replication, that, although plaintiff so accepted it, it was not paid when due, and still remained unpaid. Demurrer, assigning for causes, that the replication attempts to put in issue an immaterial matter; that, as it is admitted that the note was taken absolutely in satisfaction and discharge of the said cause of action in the first count mentioned, the defendant's liability on the bill could not revive upon the dishonour of the note; and also that it is not alleged in the declaration that the note became due or was dishonoured before the commencement of this suit, or was then in the plaintiff's hands, or that Parish was even requested to pay the same, or that the same was presented for payment, or that the defendant had any notice of its non-payment, or was, after the dishonour of the said note, requested to pay the amount of the said bill.

To a plea, that another bill was given and accepted in satisfaction of the one on which the action is brought, the plaintiff cannot reply, that such substituted bill was dishonoured and is unpaid.

Parke, B.—The note is given for more money than the original bill, and the plaintiff has his remedy upon it. The plaintiff may amend and take issue, on the note being accepted, in accord and satisfaction.

4. *To a Plea of no Consideration.* See also, Div. (a).

BRAMAH *v.* ROBERTS, H. T. 1835. C. P. 1 *Bing. N. S.* 469; S. C. 1 *Scott*, 350; S. C., *by name of* BRAMAH *v.* BAKER, 3 *D. P. C.* 392.—S. P. PRESCOTT *v.* LEVI, H. T. 1835. C. P. 3 *D. P. C.* 403.

To a plea of no consideration and fraud, plaintiff may reply there was fair and bonâ fide consideration.

To an action by indorsee against acceptor, the defendants pleaded, that they had been defrauded of the acceptance, which they had given to a third person to hold; and that the plaintiffs received the bill without a full and valuable consideration.

The Court held, that it was sufficient to reply generally, that there was a fair and bonâ fide consideration, (without stating it specifically), and that the plaintiffs had no notice of the premises in the plea mentioned.

PRESCOTT *v.* LEVI, H. T. 1835. C. P. 3 *D. P. C.* 403; S. C. 1 *Scott*, 726.

A replication to a plea of no consideration, which alleges there was a valuable one between plaintiff and the immediate indorser, may conclude to the country.

INDORSEE against acceptor. Plea, that the plaintiffs gave no consideration for the bill. Replication, that plaintiffs took and have always held, and now hold, the said bill for value, and for a good and valuable consideration, and this the said plaintiffs pray may be inquired of by the country. Demurrer, assigning for causes, that the plaintiffs have not, in their replication, stated or shewn what was the value or consideration for and in respect of which they took the said bill, or the nature or description of such value or consideration, or by whom such value was received, or to whom the consideration moved, or when the same arose; and the said replication, after stating such value or consideration, should have been concluded with a verification, and not to the country.

Per Cur.—The plea states nothing more than that the plaintiffs were not holders for value, and that there was no consideration for the defendant's accepting the bill. In their replication, the plaintiffs allege that they gave full value for the bill. Now, reasoning by analogy from an action brought under these circumstances to the case of an action of debt on bond, where the plea is non est factum, release or discharge, in a replication alleging that such release or discharge was obtained by fraud, it is not necessary for the party to set out all the particulars of the imputed fraud. We, therefore, think the replication good.

BASAN *v.* ARNOLD, E. T. 1840. Ex. 8 *D. P. C.* 356; S. C. 6 *M. & W.* 559.

Plea, that the bill was an accommodation bill, and that the plaintiff delivered it to a

INDORSEE against acceptor. Plea, that, after the bill was indorsed to the plaintiff, and before the commencement of this suit, the plaintiff indorsed and delivered the said bill, upon good and sufficient consideration, to a certain person whose name is to the defendant unknown, and the defendant then became and still is liable

to pay the amount of the said bill to the said person to whom it was so indorsed, and who from the time of that indorsement hitherto has been and *still is* the holder thereof. Verification. Replication, that, at the time of the commencement of this suit, the plaintiff was and *still is* the holder of the said bill; without this, that any other person is the holder thereof, in manner and form as in the last plea is alleged. Conclusion to the country. Special demurrer on the ground that the special traverse, being the concluding part of the replication to the last plea, which is the part thereof which professes to take issue on the said last plea, does not put in issue the allegation contained in the said last plea, that such other person was the holder of the said bill at the time of the commencement of the suit, or the said plea being pleaded, but seeks to raise an issue, whether any other person was such holder at the date of the said replication; that if the said replication put in issue the fact, whether any other person than the plaintiff was such holder *at the time of such plea being pleaded*, the issue thereby raised is immaterial; that if the plaintiff intended to rely on the allegation in the said replication, that the plaintiff was, at the time of the commencement of this suit, and still is, the holder of the said bill of exchange, the said plaintiff should not have pleaded the same as inducement to the said special traverse, but should have concluded to the country, without the addition of such special traverse; and, further, that the said plaintiff, in the said replication, hath so replied as to leave the said defendant in doubt as to the *part* of the said replication on which the said plaintiff means to take issue; and that the said traverse is double and immaterial.

Parke, B.—The words in the replication, “was and still is,” refer to the time of the plea pleaded; and, that being so, the traverse is too large, since it obliges the defendant to prove, not only that the person unknown was the holder at the commencement of the action, but also at the time of pleading the plea. The latter fact is immaterial; and, therefore, the replication is bad. The result, then, is this, that each party may have leave to amend; otherwise there will be judgment for the plaintiff.

third party, who was and still “is” the holder of it. Replication, that the plaintiff still “is” the holder of it:—Held bad, the word “is” being ambiguous.

COLE *v.* CRESWELL, M. T. 1840. Q. B. 4 P. & D. 404; S. C. 11 *Ad. & E.* 661.

PLEA to assumpsit on a promissory note, that it was made and delivered by the defendant to the plaintiff for the purpose of the plaintiff paying, on account of the defendant, certain debts due by the defendant to third persons; that the plaintiff received it for that purpose and no other, and promised the defendant to pay them, but had not done so; and that the defendant was still liable to pay them; and that the defendant had received, and the plaintiff had given no consideration for it. Replication, that the defendant, at the request of such third persons, made and delivered the note to the plaintiff, and the plaintiff received it at their request for the purpose of paying, so soon as the defendant should have paid the note, absque hoc, that the plaintiff promised the defendant to pay them as in the plea alleged. Issue thereon:—Held, on motion to arrest judgment, that there appeared a good consideration for the note, and that the plaintiff was entitled to judgment.

Plea, that the note was given to the plaintiff to pay certain persons with the proceeds, and no other consideration. Replication, that the note was not paid:—Held sufficient after verdict.

5. *To Plea of Fraud.*

NOEL *v.* BOYD, M. T. 1835. Ex. 4 D. P. C. 415; S. C. 1 T. & G. 211.

To a plea shewing fraud, and alleging that plaintiff is not a bonâ fide holder, plaintiff may, in his replication, traverse the latter allegation only.

INDORSEE against the acceptor. The defendant pleaded a special plea, shewing fraud on the part of the drawer and the subsequent indorsees, and alleging that the plaintiff took the bill with a knowledge of those facts, and concluded by averring that the plaintiff was not a bonâ fide holder of the bill for value. The plaintiff replied that he was a bonâ fide holder of the bill for value. At the trial, a witness was called for the plaintiff, who proved that he applied to him to discount the bill as indorser.

Gurney, B., left the case to the jury, upon the credibility of the witness, and upon the question whether it was a bonâ fide transaction on the part of the plaintiff; observing, that the allegations of fraud, as stated in the plea, were admitted by the replication. The jury having found for the defendant, on motion for a new trial—

Alderson and Gurney, B.'s, held that the jury were warranted in their finding, and that the verdict ought not to be disturbed. Parke and Bolland, B.'s, thinking that the jury might have been misled by the observations of the learned judge as to the effect of the admission on the record, were of opinion that the case ought to be submitted to another jury.

6. *To a Plea of Release.*

BROOKS *v.* STUART, H. T. 1839. Q. B. 1 P. & D. 615; S. C. 10 Ad. & E. 854.

Declaration against the maker of a joint and several note. Plea of release to another of the makers. Replication, it was at the defendant's request, and that he promised to pay as if no release had been given:—Held bad.

To an action on a promissory note, and on the money counts, the defendant pleaded that the promises were made jointly with one A.; and that the plaintiff, by indenture, released A. from the causes of action in the declaration mentioned. Replication, as to the first count, that the defendant requested A. might be released; and that, in consideration of A.'s being so released, the defendant ratified and confirmed the promise in that count mentioned, and promised to remain liable on the note as to the other counts; that the promises were not made jointly with A.; and that he was not released therefrom. Special demurrer to the first replication, on the grounds of a departure, that it was double, and that the matter should have been pleaded by way of estoppel. To the second, that it was double, and amounted to a general replication of *de injuriâ*.

Lord Denman, C. J.—The replication is bad. It is an attempt by parol to destroy the effect of a deed. As to this being a conditional agreement, the breach of the promise leaves every thing as it was before it was entered into.

Per Cur.—Judgment for the defendant.

7. *In Trover.*

FANCOURT *v.* BULL, E. T. 1835. C. P. 1 B. N. S. 681; S. C. 1 Scott, 645.

A. employed B. to get a bill dis-

counted, and who deposited it with defendant as a security

for a debt. Plea, stating that the drawer and payee of the bill was lawfully possessed of the bill; and being so possessed, he indorsed the bill to F. P., and F. P. indorsed for value to the defendant. Replication, alleged that there never was a good or valuable consideration for F. P. indorsing the bill to defendant.

The Court refused to arrest the judgment; the facts in the plea not shewing the property in the bill (admitted to have been in the plaintiff), to have been divested, and so no avoidance of the plaintiff's right of action.

counted; he deposited it with C., as security for a debt. In trover, a plea that B. was lawfully possessed of the bill, and indorsed it to the defendant for value, is a good plea.

(I) EVIDENCE—See also, *antè*, Div. *Forgery*, p. 348.

1. *Producing the Bill or Note.*

READ *v.* GAMBLE, M. T. 1840. Q. B. 10 A. & E. 597.

IN an action on a cheque. Plea, that it was given for money lost in gaming, and issue thereon—

The Court held, that, the plea admitting the giving the cheque, it was not necessary to produce it in the plaintiff's case, nor for the purpose of aiding that of the defendant; notice to produce not having been given.

As a plea, that the note was given for money lost at play, admits the giving the note, it need not be produced, without notice*.

2. *Proving that the Bill or Note corresponds with the Instrument described in the Declaration†.*

3. *Proving the drawing and indorsing.*

ALLPORT *v.* MEEK, H. T. 1830. N. P. 4 C. & P. 267.

IN an action by the indorsee against the acceptor of a bill of exchange, the witness called to prove the handwriting of the drawer stated, that neither the drawing nor indorsement were those of the person whose they purported to be: but it was proved, that the defendant had acknowledged the acceptance to be his. It was contended, that, as the acceptance admitted the drawing to be correct, the jury might find for the plaintiff, if they thought, upon inspection of the

Before the new rules, in an action by indorsee against acceptor, an admission of the acceptance did not dispense with some proof of the drawer's handwriting‡.

* To prove the original contract, the bill or note must (unless admitted by the plea) in general be produced; and, if there be foreign bills drawn in sets, both sets must be produced, when an objection may be taken to the insufficiency of the stamp. The production of the bill or note is dispensed with in special cases: as where it can be shewn that the bill or note has been lost or destroyed by the defendant; (see Lord Raym. 731); or that it is in the hands of the defendant, and that he has had notice to produce it. (See 2 B. & P. 39). In these cases a copy, or parol evidence of its contents, may be received. But, as these instruments are negotiable, direct proof should be given of their destruction; or it must be shewn that the defendant cannot be again called on for payment. (See 2 Campb. 211; 6 Esp. 126; 3 Campb. 124; 4 Taunt. 602; 4 Esp. 159). Where a bill has been, however, indorsed specially to the plaintiff, the plaintiff may prove that it has been stolen, without having been indorsed by him, and recover on giving parol evidence of its contents. (See 2 Campb. 214).

† The bill or note must be proved to correspond with the instrument stated in the declaration.

‡ In an action against the acceptor of bills, drawn and indorsed in the name of "Thomas Wilson Richardson," it was held to be immaterial that the drawer at the time of the drawing signed his name only as "Thomas," for the acceptance authenticates the drawing. (*Tindal, C. J.—Schultz v. Astley*, H. T. 1835, N. P., 7 C. & P. 99).

bill, that the drawing and indorsement were of the same handwriting—

But *Tindal*, C. J., held it to be necessary, that some proof should be given as to whose the handwriting was.

HARDING v. JONES, H. T. 1835. Ex. 1 *Tyrw. & Gr.* 135.

But an offer of compromise is evidence of drawing and indorsing, though both are denied by the plea.

PLEA, in assumpsit by indorser against drawer, denying the drawing and indorsement:—

Lord *Abinger*, C. B., held, that an offer of compromise, after action brought, was evidence for a jury, as recognizing the handwriting, although that was contradicted by three witnesses; and the Court refused to interfere with the finding.

LYON v. HOLT, T. T. 1837. Ex. 5 *M. & W.* 250.

If a plea states an indorsement not mentioned, constituting a material fact, it must be proved.

In an action by a prior against a subsequent indorsee, alleging an intermediate indorsement to W., and the defendant pleaded an indorsement to W. by H., and that, by an agreement between H. and the plaintiff, the latter accepted substituted bills, and time given to the parties on the bill—

The Court held, that the allegation in the plea of the indorsement to H. was a material one; and it appearing that H. was a party to the bill, and liable thereon, the defendant was bound to prove it, and not doing so, the plea not proved, and the plaintiff entitled to the verdict.

4. *Proving the Acceptance.*

TANNER v. BEAN, T. T. 1825. K. B. 4 *B. & C.* 312; S. C. 6 *D. & R.* 338.

In an action by indorsee against indorser, the acceptance need not be averred nor proved.

ACTION by indorsee against indorser of a bill of exchange, dishonoured on presentment for payment. The declaration averred it was accepted by the drawee; the acceptance not being proved, it was objected, that, this being matter of description of the bill declared upon, the plaintiff was bound to prove the allegation. On the case coming before the Court—

Per Cur.—It might be struck out, but need not be proved; for the fact of acceptance, on the contrary, does not alter the indorser's obligation to pay the bill, if the drawer does not. The holder of a bill need not present it for acceptance before it become due, unless he thinks fit. If he keeps it till it is due, and it is not paid, the indorser is equally liable to him, whether it is accepted or not.

MOLLOY v. DELVES, E. T. 1831. C. P. 7 *Bing.* 428; S. C. 5 *M. & P.* 275; S. C. 4 *C. & P.* 492.

Against the acceptor, a declaration, alleging the drawing and acceptance of a bill, is supported by shewing an acceptance after the bill was drawn*.

INDORSEE against acceptor. The declaration, in the usual form, alleged the drawing and the accepting; but it appeared, in fact, that the acceptance was written before the bill was drawn. This was contended to be a variance.

The Court considered the objection as unsustainable.

* If, in an action on a bill of exchange, the question be whether the acceptance be that of the defendant or not, the jury will be allowed to look at letters written by the defendant on the subject of the bill, which are given in evidence in the cause. (*Eaton v. Jervis*, 1838, N. P., 8 *C. & P.* 273).

GOLDSTONE v. TOVEY, H. T. 1840. C. P. 6 Bing. N. S. 98; S. C. 8 Scott, 394.

In an action on a bill of exchange, it appeared that the defendant's name was put, as acceptor of a bill, by his wife—

The Court held, that the circumstances of her managing his business as an innkeeper, and that she applied the proceeds in discharge of debts incurred in his business, were not sufficient to establish an authority to accept bills; nor the fact of her having, three months afterwards, signed other notes, the amount of which was paid to his creditors.

But, the circumstance of the acceptor's wife having received the money for the bill, and paid his debts,

WARREN v. ANDERSON, M. T. 1840. C. P. 8 Scott, 384.

In an action on a bill of exchange, the evidence of handwriting to an acceptance was that of the banker's clerk, who only once saw the party sign his name in the book, and thought the signature in question the same, and that cheques similarly signed had passed through the house—

The Court held it evidence to go to the jury.

or a banker's clerk, who saw the acceptor sign a book, and paid his cheques, is not evidence of his handwriting.

HOLT v. SQUIRE, T. T. 1825. N. P. 1 R. & M. 282.

In an action against the acceptor of a bill of exchange, the defendant's attorney had given notice to the plaintiff to produce all the papers relating to a bill described as the bill in question, and said to be accepted by the defendant.

Abbott, C. J., ruled that proof of the attorney's handwriting to the notice was sufficient *prima facie* evidence of the defendant's acceptance.

A notice to produce, describing a bill as accepted by defendant—proof of the attorney's handwriting to the notice, is *prima facie* evidence of the acceptance.

5. *Proving the Presentment.*

SEDGWICK v. JAGER, H. T. 1832. N. P. 5 C. & P. 199.

INDORSEE against drawer. The acceptor had made the bill payable at the house of a person named T. It was proved that the bill was presented at T.'s house, which was not the acceptor's residence; and notice of dishonour was given to the defendant, but there was no proof of the handwriting of the acceptor.

Park, J., was of opinion that, without such proof, there was not evidence of dishonour; as, to make out dishonour, the bill must have been presented.

In an action against the drawer, where the presentment is not at the residence of the acceptor, his handwriting must be proved.

CROXON v. WORTHEM, E. T. 1839. Ex. 5 M. & W. 5.

AN indorsee declared against the maker of a promissory note, made payable at Messrs. Smith, Payne & Co.'s; and the declaration contained the usual averment, that the note was presented there for payment when it became due. The defendant pleaded that it was not presented for payment. No presentment was shewn; but it was proved that after the note became due it was shewn to the defendant, who promised to pay it by instalments.

Per Cur.—The defendant had to pay the note, which he had made payable at a particular place; as against him, at all events, it appears to us that his subsequent admission admits all that is necessary to enable the plaintiff to recover.

A promise to pay by the maker of a note, after it became due, is an admission of presentment.

6. *Proving the Notice of Dishonour.*

HAWKES v. SALTER, E. T. 1828. C. P. 4 *Bing.* 715; S. C. 1 *M. & P.* 750.

That notice of dishonour was sent by the post, is not proved by shewing that a clerk received the letter from his master, but it was the duty of another clerk to put letters into the post;*

IN an action on a bill of exchange (against the drawer), in order to prove that notice of the defalcation of the acceptor had been duly given, a clerk was called, who said that a letter containing such notice was written by one of the plaintiffs, and copied by him, the witness, into a letter-book, and that all letters so copied were regularly sent to the post-office; but that he himself did not carry the letter in question to the post, it being the duty of another so to do.

The Court held that this was not evidence sufficient to prove the letter sent.

FOWLER v. HENDON, M. T. 1835. Ex. 4 *Tyrw.* 1002.

and it must be shewn that the letter was put in so as to be delivered in time.

THIS was an action of assumpsit by the indorsee against indorser; the parties living within the limits of the twopenny post, and notice requiring to have been given on the 7th; and the only evidence of notice being, that the letter was put into an office by daylight, on the morning of that day, but no evidence being given where the office was situate, or of the course of the post—

The Court held, that the affirmative proof was on the plaintiff, to shew that it was put in in time to have been delivered the same night; and that it was improperly left to the jury to say if there was reasonable evidence that it came to the defendant's hands on that day.

BRAITHWAITE v. COLEMAN, E. T. 1835. K. B. 4 *N. & M.* 654.

A statement by a defendant, that he had not received "the letter in time," is not an admission to go to the jury that the notice was sent in time.

THE defendant, in a conversation with the witness, said, "that he had a good defence to an action on a bill of exchange; that the plaintiff did not send him the letter in time;" which, as the witness understood, referred to the letter giving him notice of dishonour. No other proof of the letter was given; but the defendant had had notice to produce.

Lord *Lynnhurst*, C. B., told the jury, that as the defendant did not, on being required by notice, produce the letter, they might infer that notice of dishonour was sent in time. A verdict was found for the plaintiff. On motion to set it aside—

Per Cur. (Lord *Denman*, C. J., dis.).—The plaintiff has not proved his case, that notice was sent in time; in the absence of the letter, the plaintiff might give parol evidence of its contents; the parol evidence was that the notice was out of time; and we think there was not enough to go to the jury; nor could they go beyond the evidence, and infer a fact contrary to it.

NORRIS v. SALOMONSON, H. T. 1837. C. P. 4 *Scott*, 257.

But the drawer, in reply to be—

THE proof of notice of dishonour was, that a common friend of the plaintiff and the defendant, but not the agent of either party,

* In an action by the indorsee against the drawer of a bill of exchange, the declaration stated the dishonour of the bill in the usual form, "of which he then had notice." Plea, that the defendant "had not notice from the plaintiff of the non-payment of the said bill." It was proved that the indorser received notice of the dishonour from the plaintiff, and that the indorser's clerk, and not the plaintiff, gave notice to the defendant:—Held sufficient. (*Newen v. Gill*, H. T. 1838, N. P., 8 C. & P. 367).

met the defendant at the theatre, informed him of the dishonour of the note, and asked him if he was aware of the fact. He answered in the affirmative, and said he had received a very civil letter on the subject, and that he would attend to it. On this evidence the plaintiff had a verdict—

And the Court said.—In this case the notice derives its importance and effect from the party's own mouth. He, in fact, gives evidence against himself. This, we think, may be included amongst a class of cases in which a certain act, otherwise necessary, may be held to be waived, inasmuch as it is evident, from the party's own conduct, that he is aware of that of which the notice is necessary.

ing asked whether he knew the bill was dishonoured, saying, "Yes, I have had a civil letter on the subject, and will call and arrange it," is evidence of notice of dishonour.

HICKS v. DUKE OF BEAUFORT, E. T. 1839. C. P. 4 *Bing. N. S.* 229; S. C. 5 *Scott*, 598.

IN an action on a bill of exchange by indorsee against drawer, where the issue joined was, whether due notice of dishonour had been given, it appearing that, six months after it became due, the drawer requested the holder to exhaust all his influence to obtain payment from the acceptor, as the bill had been merely drawn for his accommodation—

The Court held that, in the absence of any unconditional promise, the Judge properly directed the jury to say whether they could presume, from the circumstances, that the defendant had received notice of dishonour.

In the absence of proof of notice of dishonour, it may be left to the jury to say whether it can be presumed from the circumstances.

SWAIN v. LEWIS, T. T. 1835. Ex. 2 C., M. & R. 261; S. C. 4 D. P. C. 261.

THE plaintiffs proved that they had given notice of dishonour of the bill to the defendant, in a letter which was sent to him by the post. The contents of this letter were proved by an entry in a book. It was objected, that a notice ought to have been given to the defendant to produce that letter, before secondary evidence could be given of it. The sheriff overruled this objection, and the plaintiffs recovered a verdict.

Notice to produce notice of dishonour never requisite to let in evidence of the fact that the latter was given.

Per Cur.—There is a case in the Common Pleas, and that Court decided that it was not necessary to give notice to produce a notice of dishonour. The Judges have taken an opportunity of conferring upon this point; and it is agreed by all that it is best to adhere to that decision.

7. *Where Note made or Bill accepted by an Agent, or given to a Secretary of a Public Company.*

BOOTH v. GROVE, E. T. 1828. N. P. 1 M. & M. 182; S. C. 3 C. & P. 335.

THE declaration stated, that defendant made the notes, "his own proper hand being thereunto subscribed." The notes were in fact drawn by the defendant's son, under his authority.

Per Lord Tenterden, C. J.—It is sufficient; the allegation of the defendant's handwriting may be rejected as surplusage.

An allegation, that the defendant made the note, "his own handwriting being thereunto subscribed,"

is supported by shewing it was made by another.

ROBERTSON *v.* STEWARD, T. T. 1840. C. P. 1 M. & G. 511; S. C. 1 Scott, N. S. 419.

Where a clerk to a company sues on a bill in his own name, that circumstance need not be proved, unless defendant pleads, that plaintiff is a public officer, and then denies his appointment.

IN an action on a bill made payable to the manager of the N. P. bank, the plaintiff sued in his own name, and not as the public officer; but the defendant did not plead that the bank was established under 7 Geo. 4, c. 46, and that the plaintiff was not the public officer.

The Court held, that it was not incumbent on the plaintiff to prove that he was such officer, nor was the defendant entitled to show that he was not; but, on proof of the plaintiff's being in fact the general manager, and of demand having been made on behalf of the bank, that he was entitled to recover. So, where the action was brought in the name of such officer,—held not to be necessary to allege in the declaration that he is a member of the company or resident in the country, or that he has been duly registered as such officer.

8. *On Pleas of Accord and Satisfaction.*

GOLDSHEDE *v.* COTTRELL, M. T. 1836. Ex. 2 M. & W. 20.

It is for the jury to say, whether one bill be given in lieu and satisfaction for another.

PLEA, in assumpsit by indorsee against maker, that he gave two bills to the plaintiff to take up the note, and in lieu thereof, and that defendant was a party liable on the bills to the plaintiff, and that they were outstanding in the hands of the plaintiff. The plaintiff negatived the receipt on those terms, and also replied, that one of the bills was due at the commencement of the suit. The defendant put in evidence a memorandum by the plaintiff, that the defendant had given him two bills for 210*l.* to take up a bill for 420*l.* overdue. It appeared, however, that the plaintiff retained the latter, and that one of the bills was overdue when the action was commenced.

The Court held, that it was a question for the jury, whether the bills were received in substitution of the note, or merely in suspension of the right of action; and the jury having given a verdict for the plaintiff, the Judge not having been asked to leave that question to them, they refused to disturb it.

SHEARM *v.* BURNARD, T. T. 1839. Q. B. 2 P. & D. 565.

Indorsee against maker. Plea, stating a former note, and that the present had been given in lieu of it, and that the former note had been paid:—Held, that note need not be produced.

THE defendant pleaded, that he had made a former note, and delivered it to the indorser, which was by him indorsed to the plaintiff; that there was no consideration for that note; that, when it became due, he made the note in the declaration mentioned, and delivered it to the indorser, to enable him to take up the former note; that the defendant received no other consideration for this second note; that the indorser paid the plaintiff the amount of the latter note, (that mentioned in the declaration), and the plaintiff accepted it. Replication, *de injuriâ*.

Per Cur.—The second note being admitted in the pleadings, its production was not necessary. Had proof of the first been material, it should have been produced or notice given to produce it; but it was not material. The test mentioned in the argument is the true one. If this record were set up as a defence to an action on the

first note, we are inclined to think it would be demurrable. The replication *de injuriâ* puts in issue material averments only; the only material averment here is, that the indorser paid the money; and of this the Court would have been bound to take judicial notice on such a demurrer as we have supposed.

9. On Pleas of Consideration.

LACEY *v.* FORRESTER, E. T. 1835. Ex. 3 *D. P. C.* 668.—S. P.
PERCIVAL *v.* FRAMPLIN, E. T. 1835. Ex. 3 *D. P. C.* 748.—
S. P. LOW *v.* BURROWS, H. T. 1835. K. B. 4 *N. & M.* 367.

ACTION on a bill of exchange. Plea, that no consideration was given. Replication, that there was. At the trial, the plaintiff gave no other evidence than the production of the note.

The Court held, that the *onus* lying on the defendant, he could not be in a better condition by having pleaded an informal plea; and the defendant having called evidence, which the secondary told the jury, if they believed it, amounted to a defence, they found for the plaintiff—

The Court refused a new trial, it having been properly left on the credit of the witness.

Plea, no consideration; replication, value was given—the *onus* lies on the defendant to support his plea*;

MILLS *v.* BARBER, E. T. 1836. Ex. 1 *M. & W.* 425, *overruling*
HEATH *v.* SANSOM, E. T. 1831. K. B. 2 *B. & Ad.* 291.

DECLARATION on a bill of exchange drawn by S. B. Plea, that the defendant accepted the bill for the accommodation of Samuel Barber, and without any consideration, and that Samuel Barber indorsed it to the plaintiff without consideration; and that Samuel Barber and the plaintiff have always held it without value or consideration. Replication, *de injuriâ*.

The Court held, under these pleadings, it is not incumbent upon the holder, in the first instance to prove that he gave value for it; but the rule is otherwise when the title of the holder is impeached by proof that the bill had been originally obtained by fraud, duress, or some improper practice.

unless fraud, or some improper practice, be shewn by the defendant;

THOMAS *v.* NEWTON, E. T. 1827. N. P. 2 *C. & P.* 606.

IN an action by the indorsee against the acceptor of a bill of exchange, the defendant shewed that there was originally no consideration for the bill.

Lord *Tenterden*, C. J.—If the defendant shews that there was

which the plaintiff must rebut.

* As, where a replication to a plea, that the bill was accepted for accommodation, and without consideration, alleged that it was accepted for good consideration, and not &c.:—Held, that the replication alleging no more than the bill imported, the plaintiff was entitled to recover without proof of actual consideration, the cause being undefended. (*Batley v. Catterall*, 1834, N. P., M. & Rob. 379).

So, in an action by indorsee against acceptor, plea, that the payee received the bill to get it discounted, and did not pay over the proceeds to the defendant, without stating any fraud, is not sufficient to compel the holder to give evidence of the consideration. (*Jacob v. Hungate*, 1834, N. P., 1 M. & Rob. 445; doubting *Thomas v. Newton*, 2 C. & P. 606; and *Heath v. Sansom*, 2 B. & Ad. 291).

And, where the jury found, that the consideration of a note, (the disclosure of an invention), had not wholly failed, though less beneficial than was expected, the Court refused to disturb the verdict. (*Day v. Nix*, 9 Moore, 159).

originally no consideration for the bill, that throws it on the plaintiff to shew that he gave value for it, or that *he* or some *previous* indorser gave value for it.

PERCIVAL *v.* FRAMPTON, E. T. 1835. Ex. 2 C., M. & R. 180; S. C. 5 Tyrw. 579.

A plea, that bill was partly given for accommodation, and partly without consideration, does not throw upon plaintiff the obligation to prove the latter—the defendant must impeach it.

PLEA, that the note was made and delivered to the defendant, that he might indorse it for the accommodation of the maker, to enable him to obtain advances of money thereon; that the plaintiffs had only advanced a part, and there was no consideration for the residue. Replication, that the plaintiffs were holders of the note for good and valuable consideration given to the maker in respect of their being such holders to the full amount. On this issue—

Per Cur.—The only fact admitted on the pleadings is, that the indorsement was for the accommodation of the maker. That raises no inference that the plaintiffs are the holders without consideration. Where it is alleged that the bill or note has been obtained by fraud, or has been stolen, the inference does arise, that the holder has not given full consideration for it; because, it is probable that the person who has obtained the instrument will pass it away for less than its value. But, where there is the simple fact of its being an accommodation bill or note, the inference is, that the holder has given value for it, since that is the object for which it is executed. We have no difficulty, therefore, in saying that the defendant ought to have begun, and have impeached the plaintiff's title to the note.

BOUNSALL *v.* HARRISON, M. T. 1836. Ex. 1 M. & W. 611; S. C. 1 T. & G. 925.

Upon a plea, that a bill was an accommodation bill, and indorsed after it was due five years ago, is evidence on the part of the defendant to go to the jury.

UPON plea to a declaration by a second indorsee against acceptor, that the bill was an accommodation bill given to R., and that the indorsement was made after the bill became due; it appearing, that, at the time of accepting the bill, R. and the defendant were friends, but subsequently quarrelled; and the bill was not put in suit until five years after it became due, and neither party called R.—

The Court were of opinion, that the circumstances amounted to *primâ facie* evidence on the part of the defendant to go to a jury.

GASCOYNE *v.* SMITH, E. T. 1825. Ex. 1 M. & Cl. & Y. 338.

But, where the consideration appeared in the note to be for the transfer of a ship (it had not been registered):—Held, after the lapse of two years, the jury might presume a sufficient consideration, partial payment having been made*.

IN an action by an indorsee of a note payable on demand, but with interest until paid, for which the consideration appeared to have been the transfer of a share of a ship—

The Court held, that, notwithstanding the agreement for such transfer was void for non-compliance with the registry acts, yet, a jury were properly directed to presume, from the lapse of time, (upwards of two years), and the payment of interest, some part of the principal, and correction as to the amount of other part, that the defendant had been in possession of the ship and its earnings; and that, if there were any consideration for the note, the action might be sustained.

* In an action on a note by an executor, as such, he is not bound to give evidence of the consideration. (*Godson v. Richards*, 6 C. & P. 189).

WILLIAMS v. —, M. T. 1829. K. B. 5 M. & Ry. 121.

INDORSEE against maker of a note. The plaintiff, who was a pawnbroker, rested his case upon proof of the defendant's signature of the note and of the indorsement. On the part of the defendant it was shewn, that the note in question had been given in substitution for a former note given upon a gaming transaction. At the time the former note became due it was in the hands of one C.; and before the plaintiff had any thing to do with the substituted note, in a conversation between the plaintiff and the witness, the plaintiff stated the consideration for the drawing of the former note.

Per Cur.—As the declaration was made prior to the plaintiff's receiving the note, on that ground it is admissible.

Admissions by the plaintiff, indorsee of a bill, before he became holder, are admissible against himself as to consideration.

HEALY v. JACOBS, E. T. 1827. N. P. 2 C. & P. 616, 618.

PAYEE against maker of a note. Defence, that the defendant, who had failed in business, had made a composition with his creditors; and that a person named P., being a creditor, would not sign the deed of composition unless this note was given to the plaintiff, to whom P. owed money; and that this was stated at the time of the signing of the note. To prove this a witness was called, who was present when the note was signed. He stated that the plaintiff was not present.

Per Gurney, B.—I am asked to receive evidence of a conversation between the defendant and a third person, the plaintiff not being present. I am clearly of opinion that I cannot and ought not to do so.—On the case coming before the Court, they concurred with *Gurney, B.*

But statements by a third party at the time of the signing of a note, as to the consideration, are not evidence against the payee who was not present.

BASSETT v. DODGIN, T. T. 1833. C. P. 10 Bing. 40; S. C. 3 M. & Scott 417.

IN an action by indorsee against indorser of bills of exchange, accepted for the accommodation of the drawer, proof, by the drawer, of his delivery of the bills in question to the father-in-law of the plaintiff to be cashed, who retained a portion of the amount far beyond the legal interest—

The Court held, it did not affix usury on the plaintiff, there being no evidence to shew that the father-in-law was acting as the agent of the plaintiff in the transaction:—Held, also, that, under such circumstances, notice to plaintiff to prove consideration given for the bills was not sufficient to impose such burden upon him.

To render proof of consideration necessary on the ground of usurious interest, the negotiator must be shewn to be the agent of the plaintiff.

BAROUGH v. WHITE, T. T. 1825. K. B. 4 B. & C. 325; S. C. 6 D. & R. 379.

IN an action by the indorsee of a note payable on demand, with interest, against the maker—

The Court held, that declarations by the payee that he gave no value for it, were inadmissible, it not being shewn that the plaintiff knew it when he took the note.

And declaration by the payee, that he gave no value does not affect his indorser without notice.*

* Action by indorsee against acceptor—a letter written by the indorser, that the former has no title, is admissible. (*Coster v. Symons*, H. T. 1824, N. P., 1 C. & P. 148).

HEATH v. SANSOM, E. T. 1831. K. B. 2 B. & Ad. 291.

If a note be taken under such circumstances that the indorser himself could not recover, the indorsee must prove that he became so for a good consideration, though no notice be given to that effect*.

ASSUMPSIT by the plaintiff, as indorsee, against the defendants, as makers, of a promissory note. At the time of drawing the note in question, one of two partners, he being also a partner in another firm, gave the note, in the name of the former firm, to the latter, who indorsed it to the plaintiff.

Lord Tenterden, C. J., Littledale, J., and Patteson, J., held, that, where it appears that a bill or note has been given without consideration as between the original parties, that circumstance alone is sufficient, in an action by the holder, to call upon him to give proof of consideration, although no previous notice has been given that such proof would be required: dubitante Mr. Justice Park, whether the defendant should not go further, and either give a previous notice that he intended to call for proof of consideration, or shew, not only that there was no consideration for the bill or note in the first instance, but that it was obtained by felony, fraud, or duress.

10. On Pleas of Fraud.**WHITAKER v. EDMUNDS, T. T. 1835. K. B. 1 Ad. & E. 368; S. C. 1 M. & Ry. 366.**

Procuring several indorsements to be made on the day before the bill became due, upon the understanding to divide the amount when recovered, is not evidence of fraud †.

IN an action, by a third indorsee against an acceptor, it did not appear but that the defendant was actually indebted to the drawer in the amount—

The Court held, that the merely procuring the several indorsements to be made on the day before the bill became due, and in order that the amount might be recovered by the indorsee, upon an agreement to divide the sum obtained between the drawer and first indorsee, was not such a fraud as disqualified the holder from suing, or to put the plaintiff on proof of the consideration.

UTHER v. RICH, T. T. 1840. Q. B. 2 P. & D. 579.

Plea, that the bill was given for a specific purpose to A., who, in fraud, indorsed it to B. without value:—Held, that fraud could not be given in evidence under this plea.

INDORSEE against drawer. Plea, that the bill had been indorsed to L. for the specific purpose of getting discounted and paying the proceeds to the defendant; and that L. had fraudulently and covinously delivered it to H.; and that the latter was never “a bonâ fide holder for valuable consideration;” and that the defendant had never received any value from L., or from H., or from the plaintiff.

The Court held, that mala fides must be distinctly alleged, and that the words, that the plaintiff was not the *bonâ fide holder*, were not equivalent to such an allegation; and that fraud could not be given in evidence under this plea: if it had stood alone, it would not have raised an issue of fraud.

PHILLIPS v. COLE, E. T. 1839. Q. B. 10 Ad. & E. 106; S. C. 2 P. & D. 288.

A holder of a

INDORSEE against drawer of a bill of exchange. Plea, that the

* By Rule H. T. 4 Will. 4, it must be taken advantage of by plea, and not by notice.

† In an action by the indorsee of a bill against the acceptor, the declarations of the drawer are admissible in evidence to shew that the bill was obtained by fraud. The plaintiff must be, however, shewn to be in some way privy to the fraud. (*Peckham v. Potter*, H. T. 1824, N. P., 1 C. & P. 232).

bill was obtained and indorsed by fraud, and no consideration passed from the prior indorsee.

The Court held, that letters of the latter, acknowledging the fraud, were not admissible when no evidence had been given to connect the plaintiff with him, or that the bill had been indorsed to the plaintiff when overdue.

bill indorsed it to the plaintiff; plea, fraud:—Held, that letters written by the former to the plaintiff could not be given in evidence.

11. *On Pleas of Gaming.*

EDMUNDS v. GROVES, T. T. 1837. Ex. 2 *M. & W.* 642; S. C. 5 *D. P. C.* 775.

ASSUMPSIT against the defendant, as the maker of a promissory note, payable to the order of one Cannon, and by him indorsed to the plaintiff. The defendant pleaded that he made the note for reimbursing and repaying Cannon the sum of 30*l.*, knowingly lent by him to the defendant for the purpose of gaming, and which money he gained, against the statutes, and for no other consideration; that Cannon indorsed it to the plaintiff without any value or consideration, and with full knowledge. Replication,—that Cannon indorsed the note to the plaintiff for a good and valuable consideration, and that the plaintiff had no knowledge. The defendant contended that the plaintiff must begin and shew consideration for the note.

Lord Abinger, C. B., thought otherwise; and a verdict was taken for the plaintiff, with liberty to the defendant to move to enter a nonsuit, if the Court should be of opinion that the onus probandi was upon the plaintiff.

The Court held, that, upon such issue, the defendant was bound to give some evidence to connect the plaintiff with the parties illegally concocting the note; and that the plea did not amount to an admission of any existing illegality; and that the jury could only draw inferences of it from facts.

Indorsee against maker; plea, that the note was given for a gambling debt, and no consideration; and that plaintiff had notice thereof. Replication, a traverse:—Held, that the defendant was in some way bound to connect plaintiff with the illegality of the transaction*.

12. *As to Partnership†.*

13. *As to Payment‡.*

MANLEY v. CULVERWELL, M. T. 1840. Ex. 7 *M. & W.* 175.

In assumpsit by indorsee against drawer; pleas, inter alia, that, whilst the bill was running, the defendant agreed with the acceptor

Payment before a bill is due is

* In an action against the maker of a cheque, the defence to which was, 1st, that it was given for a gambling debt to B. L., and that plaintiff took it of him with knowledge; and 2nd, that it was given for the gambling debt to B. L., and that plaintiff gave no value for the cheque. For the defendant the plaintiff's attorney was called, who was also the attorney of B. L.:—Held, that he might be asked where he last saw B. L., and whether he had ever seen B. L. and the plaintiff together; but that he could not be asked whether he had ever seen this cheque in B. L.'s possession. (*Bingham v. Stanley*, H. T. 1840, N. P., 9 C. & P. 374).

† In an action on an acceptance by one partner in the name of the firm; plea, by one, that it was so accepted, without his knowledge or privity, for a debt of the firm before he became a partner:—Held, not to be sustained by shewing that the debt for which it was given accrued partly before and partly after he joined the firm, but the verdict directed to be entered only for the latter amount. (*Wilson v. Lewis*, 2 Scott, N. S. 115).

‡ In assumpsit by indorsee against acceptor; pleas, payment, and release under an agreement for assignment of premises, and conditional undertaking not to

no discharge, unless the bill be given up, provided a good consideration for the transfer be given*.

to deliver it up on receiving a mortgage security, which was done, (but the drawer's name was not struck out), and that it was afterwards indorsed, without consideration, by the acceptor to S., and by S. to the plaintiff, without consideration; secondly, that, after the bill was so fully paid and satisfied, it was re-issued by the acceptor without any new stamp, and issues thereon.

The Court held, that, upon proof of consideration respectively passing, the plaintiff was entitled to recover, and that the fact of the acceptor having satisfied the bill before it became due was no defence against a bonâ fide indorsee. Nothing can discharge the acceptor or drawer but payment according to the law of merchants.

14. *As to the effect of Payment of Money into Court.*

REID *v.* DICKENS, M. T. 1833. K. B. 2 N. & M. 369.

On a note payable by instalments, payment of money into Court does not admit beyond the sum paid in, though it admits the contract.

IN an action on a promissory note payable by instalments, the declaration averring non-payment of several instalments, the defendant pleaded non assumpsit, and the Statute of Limitations, and paid into Court a sum of money less than the amount of the instalments.

Per Cur.—The payment admits the contract as alleged, and a liability to the amount paid in; but, as to the remainder, the Statute of Limitations may be taken advantage of. The case is analogous to that of an express admission of the contract, accompanied with a statement that no more is due than the sum paid into Court.

15. *Under the Common Counts.*

SUTTON *v.* TOOMER, M. T. 1827. K. B. 7 B. & C. 416; S. C. 1 M. & R. 125.—S. P. TOMKINS *v.* ASHBY, E. T. 1827. K. B. 6 B. & C. 541; S. C. 9 D. & R. 543.

A bill or note as between original parties is evidence of money lent;

THE plaintiff deposited money with the defendant, a banker, and received a note properly stamped, promising to pay the sum deposited "with interest at the rate of 3*l.* per cent. per annum to the day of acceptance," and it was proved that the money was in fact deposited upon the terms specified in the note, and that interest at 3*l.* per cent. had for some time been paid, but that a subsequent alteration, at the request of the defendant, was made in the note, by striking out the word "three" and writing over "two and a half." It was contended that the plaintiff was not entitled to recover; but *Best, C. J.*, directed the jury to find for the plaintiff.

And the Court held, that the plaintiff was entitled to recover as for money lent.

sue; and it appearing to have been taken up by a party for the honour of the acceptor, before it had been refused by the acceptor:—Held, not to support the plea of payment by or on behalf of the acceptor, and that such agreement did not support the allegation of release. (*Deacon v. Stodhart*, 1840, N. P., 9 C. & P. 685).

* Where payment of interest is indorsed on a bill, the presumption is, such payments were made when they bore date, unless the contrary be proved. (*Smith v. Ballens*, 1834, N. P., M. & Rob. 341).

MORGAN v. JONES, M. T. 1830. Ex. 1 C. & J. 162; S. C.
1 Tyrw. 21.

THE first count stated, that, in consideration that the plaintiffs, at the special instance and request of the defendant, would lend and advance to him, the defendant, a certain sum of money, to wit, the sum of 75*l.*, he the defendant undertook, and there faithfully promised the plaintiffs, to pay to them that said sum of 75*l.*, with lawful interest for the same, nine years after the fourth day of August, 1820, provided that one David Morgan, the brother of the said plaintiffs, should not return to England, or his death be duly certified in the mean time. Averment, that the plaintiffs, relying upon the said promise, did afterwards, to wit, on &c., at &c., lend and advance to the said defendant the sum of 75*l.*, and that the said David Morgan, the brother of the said plaintiffs, had not yet returned to England, nor had his death been duly certified. Breach, that the defendant had not paid the said 75*l.* The declaration also contained a count for interest, the usual money counts, and a count upon an account stated. At the trial, the plaintiffs produced the following instrument in support of their case:—"Nine years after the date hereof, I, Stephen Jones, do hereby promise to pay to John Morgan and Samuel Morgan the sum of 75*l.*, with lawful interest, provided David Morgan, the brother of the said J. Morgan and S. Morgan, shall not return to England, or his death be fully certified in the mean time, for value received. Dated the 24th day of August, 1820."

but, if it contain a condition, it is not a note so as to support the account stated.

Per Cur.—This instrument appears to have been originally a promissory note within the statute of Anne, but then a contingency has been introduced, which, making it conditional, destroyed its character. Not being a promissory note, it cannot be given in evidence under the special counts; the consideration there alleged is money lent; but is there any thing to prove that in this instrument? We have been called on to infer it from the words "value received," contained in it; but those words have a very different import in promissory notes or bills of exchange from what attaches to them in other instruments; in the one case their meaning arises from the custom of merchants, in the other from the construction of law only. The question then is, if this instrument will not support the special counts, will it support the common counts? Before the statute of Anne, debt would lie by the payee against the drawer of a bill where it expressed to be for value received, and *Bishop v. Young* (2 B. & P. 80), shews only that debt lies on a promissory note by the payee against the maker, where value appeared on the face of it to have been received in goods. An instrument in the form of this could never have supported the common counts, and there is no difference in the form of promissory notes since the statute of Anne; before that statute, it was a requisite of a promissory note, that it should be payable at all events. In *Pearson v. Garrett*, (Comberbach, 227; S. C. 4 Mod. 242), the question arose upon a note or instrument payable upon a contingency, declared on as a promissory note; and it was decided, upon demurrer, that such instrument had no effect as a promissory note. Before that statute, promissory notes were negotiated by the custom of merchants, and were then, as now, only admissible in evidence on the common counts, when

payable at all events, and put in suit between the original parties; and the decision in *Bishop v. Young* must be considered as applicable to such notes only.

16. *Inspection of the Bill or Note*.*

17. *At Trial, who to begin.* See, also, ante, Div. p. 373, *Evidence of Consideration.*

LEWIS v. PARKER, E. T. 1836. K. B. 6 N. & M. 294; S. C. 4 Ad. & E. 838.

If the only issue be, whether the bill was indorsed after it became due, it lies on the defendant†.

ASSUMPSIT on a bill of exchange by the indorsee against the acceptor. Plea, that the bill was drawn for the accommodation of the acceptor by the drawer's getting it discounted; that the drawer indorsed it without consideration to W. M. E., and that W. M. E. might discount it for the use of the defendant; that W. M. E. received the bill for the purpose of discounting it, but did not at any time discount it, or pay the defendant or the drawer any sum of money, nor in any way whatever give any consideration to the defendant, but indorsed it to the plaintiff; that the plaintiff received the bill by indorsement from W. M. E. after it became due. Replication, that W. M. E. indorsed the bill to the plaintiff before it became due. Issue thereon. At the trial, before *Williams, J.*, the question arose upon these pleadings as to which party was bound to begin; and his Lordship, after recommending the plaintiff to begin, which was declined by his counsel, directed the jury to find a verdict for the plaintiff.

The Court held, that the plaintiff was entitled to recover on production of the bill, without going into evidence, in the first instance, on the issue so taken.

(m) WITNESSES‡.

HILL v. PHILLIPS, H. T. 1832. N. P. 5 C. & P. 356.

Where the attesting witness

THERE was a subscribing witness to the acceptance, whose name was G. P., one of the defendant's sons. He was not called; but,

* When the plaintiff's address is ascertained to be false, the defendant has been allowed inspection of the bill. (*Peplief v. Codrington*, 1833, MSS.). In an action on a bill, the Court refused to order it to be deposited for inspection with the prothonotary, if a forgery was the matter of defence. (*Hildyard v. Smith*, 1 Bing. 451).

† Where the declaration by holder against acceptor stated, that the drawer indorsed to the plaintiff; the plea stated it to have been drawn and accepted by the defendant, and handed to the drawer to obtain it to be discounted, who indorsed in blank, and against good faith delivered it to the plaintiff for a purpose unknown to the defendant, of which the plaintiff had notice:—Held, that the defendant was entitled to begin. (*Lees v. Hoffstadt*, 1840, N. P., 9 C. & P. 599). A plea, that the bill had been altered after acceptance confers on the defendant the right to begin, and entitles him to call upon his adversary to produce the document, although no notice to that effect has been given. (*Barker v. Malcolm*, 7 C. & P. 101).

‡ Where an acceptance is by the christian and surname of the drawer, a witness who has seen him write his surname only is competent to prove the acceptance. (*Lewis v. Sapio*, 1827, N. P., 1 M. & M. 39, overruling *Powell v. Ford*, 2 Stark. 164).

to account for his not being present, it was proved, on the part of the plaintiffs, that many attempts had been made to subpœna him, but without success.

Tindal, C. J.—I think you have hunted quite enough after *G. P.* It is evident they were keeping you at arm's length. The bill was read, and eventually there was a verdict for the plaintiffs.

to a bill cannot be found, other evidence may be received*.

PAGE *v. THOMAS*, T. T. 1840. Ex. 6 *M. & W.* 738.

THE promissory note, on being produced, bore the signatures of Stephen Thomas, J. A. Allen, and J. Jenkins, which two latter were proved to be sureties. Jenkins was then called to prove the signature of "Stephen Thomas" to be in the defendant's handwriting, and was objected to on the part of the defendant as an incompetent witness. The Judge, who tried the cause, overruled the objection, and the plaintiff had a verdict for the amount of the note. There being no other evidence of the defendant's handwriting, the Judge reserved leave to the defendant to move to enter a nonsuit, if the Court should be of opinion that the surety was incompetent to prove the defendant's handwriting.

One of several joint and several makers of a note, a surety, is a competent witness to prove the defendant's signature.†

Abinger, C. B.—In actions by the indorsees of bills against the acceptors, the drawees and indorsees are constantly called as witnesses against the acceptor; (see Bayley on Bills, 5th edit. 536); and yet it might be urged that they have an interest in making the acceptor pay the bills. That rule governs the present case, and, therefore, the rule for a nonsuit must be discharged.

HEWITT *v. THOMPSON*, T. T. 1826. N. P. 2 *C. & P.* 372.

IN an action on a bill of exchange by the second indorsee against the drawer. The first indorsee was called as a witness for the plaintiff, and his testimony was objected to.

Best, C. J.—I will allow the witness to be examined, and give leave to move the Court.

So, in an action by indorsee against drawer, the first indorsee is a competent witness for the plaintiff‡.

REAY *v. PACKWOOD*, E. T. 1839. Q. B. 7 *Ad. & E.* 917.

IN an action of assumpsit on a bill of exchange by indorsee against the acceptor, issue being joined on a plea of payment before action brought, a prior indorsee was called as a witness for the defendant; he acknowledged, on examination on the voir dire, that he had received the money from the defendant to pay the plaintiff the amount of the bill.

So, a prior indorsee is a competent witness in an action by indorsee against acceptor, where payment pleaded.

The Court held him a competent witness.

* *Richards v. Frankum*, (9 *C. & P.* 221), decided, that the subscribing witness to a note must be called.

† At *Nisi Prius*, in an action by payee against maker, a party who was a joint maker and surety only was held an inadmissible witness, being liable, not only for damages and costs recovered by plaintiff, but for the defendant's own costs, and that he could not be rendered competent by an indorsement on the postea under 3 & 4 Will. 4, c. 42, s. 26. (*Stanley v. Gibson*, 1836, N. P., 2 *M. & Rob.* 103).

‡ The 3 & 4 Will. 4, c. 42, s. 26, does not apply to render the drawer of an accommodation bill a witness for the acceptor, and he cannot, therefore, be examined without a release. (*Burgess v. Cuttill*, 6 *C. & P.* 282).

WELSTEAD *v.* LEVY, M. T. 1831. N. P. *M. & Rob.* 138.

And that an indorsee was clearly the agent of the indorser in suing on the bill, does not prevent the latter giving evidence*.

THE defence was, that the bill was accepted without value, in order to enable Monro, who was in prison, to raise money to get his discharge, and that he had indorsed it to Benham for this purpose without value given by him. In order to prove this, a witness for the plaintiff was asked, in cross-examination, as to Benham's declarations, made whilst he was holder of the bill, but before the bill became due.

Park, J.—It is a question for me on this evidence, whether the plaintiff is merely the agent of Benham. It appears to me, that he is; and, therefore, I think, his declarations admissible. It will be for the jury afterwards to say, whether they are of that opinion, and, if so, to judge of the effect of the declarations.

(n) RULE TO COMPUTE.

CLARKE *v.* QUINCE, M. T. 1834. K. B. 3 *D. P. C.* 26.—S. P.

ALLEN *v.* MESSETER, H. T. 1833. B. C. 1 *D. P. C.* 420.

Though a bill or note has been destroyed, there may be a rule to compute†.

MOTION for rule to compute. It appeared that the promissory note had been destroyed. It was positively sworn by one deponent that he had seen the defendant tear the promissory note to pieces.

Littledale, J.—Take your rule.

FIGGINS *v.* WARD, H. T. 1834. Ex. 2 *Cr. & M.* 424.—S. P. CARTER *v.* SOUTHALL, T. T. 1838. Ex. 3 *M. & W.* 129.

In an action against several on a note, if all suffer judgment by default, service of the rule on one suffices.

IN an action on a joint promissory note against three defendants. The defendants having suffered judgment by default, and a rule nisi to compute the principal and interest due on the note having been obtained.

Per Cur.—By suffering judgment to go by default, the defendants acknowledge a joint cause of action, and, therefore, quoad hoc, they are partners. Service, therefore, on one is good for all.

(o) SUM RECOVERABLE.

LAING *v.* STONE, T. T. 1828. K. B. 2 *M. & Ry.* 561.

A note, payable at a certain time, carries interest from that time‡.

IN an action on a note payable three months after date, it was admitted that the principal had been satisfied by payments of small sums, and that the action was brought for the interest.

* But in an action by indorsee against acceptor, an accommodation drawer is not a competent witness without a release. (*Burgess v. Cuttill*, M. T. 1835, N. P., 6 C. & P. 282).

† So, if a bill be shewn to have been in the attorney's hands up to the delivery of declaration, upon an affidavit of a true copy, and that there was no indorsement on the bill, a rule was allowed to compute. (*Flight v. Weedon*, 2 Tyrw. 312).

‡ Where interest is not expressly made payable by the terms of the instrument, it runs from the maturity of the bill or note. If the bill or note be payable on demand, interest runs, not from the date of the instrument, but from the time of the demand. Where there has been no demand except the action, interest may be given from the service of the writ of summons.

D. received a bill to get discounted, and which failing to obtain, he handed it

Gaselee, J., told the jury, that the note carried interest after the three months, and that the only point for them to consider was, whether they believed from a memorandum that the interest had been paid.

And the Court said the direction was right. The non-payment of the note, when it became due, was the fault of the defendant. The learned Judge was perfectly right in stating, that the note carried interest after the three months. A note, payable at a particular time, carries interest after that time. It would be very inconvenient if it were left to the discretion, or rather to the caprice of the jury to say, whether interest should be paid or not.

ROFFEY v. GREENWELL, T. T. 1839. Q. B. 2 P. & D. 365.

On a promissory note in the following form: "I promise, for myself and executors, to pay to F., or her executors, one year after my death, 300*l.*, with legal interest;" no proof of the consideration having been given—

Per Cur.—It was admitted, that no case in point could be found, nor any which lays down the rule or principle by which this case is to be decided. Generally speaking, an instrument carries interest from its date, whether payable on demand, or at a time specified. The reason is, that the party who makes the promise must be expected to keep it; and, if he does, no interest can be due from any other period than the date. In the present case, there is, indeed, another period from which it might be computed, that of the maker's death; but it appears improbable that was his intention; he should have expressed it with more distinctness. We think, in the absence of all particular proof, that we must presume the note to have been given for value, so that interest would be due from the date. If that be doubtful, the instrument ought to be construed most strongly against the maker. The plaintiff is, therefore, entitled to the larger sum, and judgment must be entered for it.

Judgment accordingly.

DOMAN v. DIBDEN, E. T. 1826. N. P. 1 Ry. & M. 381.

"EIGHT months after date, pay me or my order the sum of 100*l.* for value received, *with lawful interest for the same.*"

On inquiry of the Court to know from what time the interest was to be calculated, whether from the date of the bill, or from the period at which it became due—

Abbott, C. J.—I think the plaintiff is entitled to interest from the date of the bill.

Verdict for the plaintiff.

FRYER v. BROWN, 1824. N. P. 1 Ry. & M. 145.

IN *assumpsit*, on the money counts, and for interest, plaintiff offered in evidence an admission by defendant, that he owed

As, "I promise, for myself and my executors, to pay A. B., or her executors, twelve months after my death, £—, with interest."

And interest runs from the date of the bill where payable with interest.

But, in all cases, to recover in—

over to the plaintiff to present, which was done, and not being paid was noted, and D. subsequently indorsed it to the plaintiff:—Held, that such indorsement was sufficient to entitle the plaintiff to sue on it; but that he could only recover the amount due from the acceptor to the drawer. (*Adams v. Oakes*, 1835, N. P., 6 C. & P. 70).

terest, the bill must be produced*.

147*l.* on a dishonoured bill, which had been indorsed by him to plaintiff.

The Court held, that such evidence was admissible without notice to produce the bill, but that unless produced the jury ought not to give interest.

KENDRICK *v.* LOMAX, E. T. 1832. Ex. 2 C. & J. 410.

Damages not accruing necessarily from the dishonour†, must be declared for specially.

Per Bayley, B.—I KNOW no instance of an action for interest or costs or charges as accessories, when you could not maintain an action for the principal. From the inquiries I have made from those most likely to be correct, I find, that it is not the practice to allow these charges, and that they cannot be recovered unless they are laid specially in the declaration.

REID *v.* FURNIVAL, E. T. 1833. Ex. 1 C. & M. 538.

A party, who has guaranteed the payment of a bill, and who has only obtained and handed over part of the amount, may nevertheless have a verdict for the whole sum named in it.

ASSUMPSIT by the third indorsee of a bill of exchange for 300*l.* against the acceptor. The defendant produced a letter of the plaintiffs, in which he stated, that the bill had been sent to him by a friend to get discounted; that he handed it over to the British Linen Company's bank, who advanced 100*l.* upon it, which was remitted to his friend, 200*l.* being withheld in consequence of the bill being dishonoured; and that he was held answerable to the bank for the amount advanced on it on his guarantie. On the part of the defendant it was then objected, that, as the plaintiff had merely acted as an agent in carrying the bill to the British Linen Company to be discounted, he had no right of action; and, 2ndly, if he had, that it was limited to the amount of his guarantie.

Per Cur.—The action may be maintained. Another person may have a claim for 200*l.* on this bill, but there cannot be two actions on it against the defendant. As soon as the plaintiff has recovered the whole amount of the bill, he becomes a trustee for the person entitled to the residue, after discharging his own claim.

See Johnson v. Kennion, 2 Wils. 262.

MARSHALL *v.* GRIFFIN, H. T. 1824. N. P. 1 Ry. & M. 41.

A demurrer admits the existence of the bills, so as to entitle the plaintiff to nominal damages.

IN the declaration there were four counts on bills of exchange. Demurrer as to the first and second counts and joinder, general issue as to the rest of the declaration, and a venire, as well to try as to assess contingent damages, &c., awarded, and upon the trial two bills only were produced.

Abbott, C. J., held, that the plaintiff was entitled to a verdict for the amount of the bills proved on the counts to which the defendant had pleaded, and for damages on those demurred to, the defendant

* And where payable at a particular place must be presented there. (*Phillips v. Franklin*, 1 Gow, N. P. 196).

† But, it has been held, that postage is recoverable under the count for money paid. (*Dickinson v. Hatfield*, 1 M. & Rob. 141; 5 C. & P. 46). The defendant in this case directed the plaintiff to charge him with it.

having admitted by the demurrer the existence of the bills declared on, and put himself to the judgment of the Court as to his legal liability upon them.

SIMPSON *v.* CLARKE, T. T. 1835. Ex. 2 C., M. & R. 342.

DECLARATION on a bill of exchange, drawn by one William Walker upon the defendant, payable to his own order, accepted by defendant, and indorsed by Walker to one Carter, and by Carter to the plaintiff. Plea, that the defendant accepted it for the accommodation of Walker, without any consideration or value for his acceptance; that Walker indorsed it to Carter without any value or consideration; that Carter indorsed it to plaintiff without any consideration or value; and that the plaintiff, at the time of the commencement of the suit, was the holder of the same without any value or consideration. Replication, that Carter had a good consideration and value for indorsing it to the plaintiff; and that the plaintiff, at the time of the commencement of the suit, was not holder of the same without value and consideration.

The Court held, that the plaintiff was only entitled to recover the amount he had actually given.

On a denial of consideration for the bill, the plaintiff is only entitled to recover the amount proved to have been given.*

(p) COSTS.

REG. GEN. T. T. 1838. Q. B. 3 N. & P. 370.—S. R. Ex. 4 M. & W. 1; S. R. C. P. 4 Bing. N. S. 814.

It is ordered, that in future, in any action against an acceptor of a bill of exchange, or the maker of a promissory note, the defendant shall be at liberty to stay proceedings on payment of the debt and costs in that action only.

The maker of a note, or acceptor of a bill, is only bound to pay his own costs on staying proceedings.

LEWIS *v.* DALRYMPLE, H. T. 1835. Ex. 3 D. P. C. 433.

PROCEEDINGS were commenced on a bill of exchange against the drawer, and also against the defendant as acceptor; the former paid the bill and costs, and it was delivered up to him, and notice was given to the defendant that proceedings against him were abandoned. His costs, however, were not paid, and, as he disputed his liability as acceptor, he ruled the plaintiff to declare, who then applied to a Judge to stay proceedings, and obtained an order for that purpose.

If an action be brought against acceptor and drawer, and the latter pays the debt and his costs, the plaintiff must go on against the acceptor, or pay his costs.

Per Cur.—The defendant denies that he is the acceptor, and says that he has nothing to do with the bill, and that you have brought an action against him which you had no right to do. You must, therefore, elect either to pay the defendant his costs or to proceed. He has no other means of being indemnified for his costs. The order must be set aside.

* The indorsee of a note taking it after notice that the maker had a cross-demand against the payee cannot recover subsequent advances. (*Goodall v. Ray*, T. T. 1835, B. C., 4 D. P. C. 76). Where, in an action by bankers on an acceptance by a customer, the latter pleaded to the whole declaration a set-off of a balance of less amount in the bankers' hands:—Held, that, although the latter were entitled to the verdict on that issue, the jury might in the damages allow the amount of such balance in their hands. (*Barnes v. Butcher*, 9 C. & P. 1841, N. P., 725).

DAWSON *v.* MORGAN, T. T. 1829. K. B. 9 B. & C. 618.

To sustain an action against the acceptor for the costs of an action, there must be a privity; hence an indorsee cannot sue.

THIS was an action by the indorser of a bill against the acceptor to recover the costs incurred by him in an action on the bill.

Per Cur.—There is no privity of contract between the indorsee and the acceptor for costs. Such a case as this must have occurred over and over again; but it has never been considered that the acceptor is in point of law bound to pay those costs. In strict law the indorser is bound to pay the holder upon receiving notice of the dishonour of the bill, and then no costs are incurred.

(*q*) STAYING PROCEEDINGS.—See *ante*, Div. *Costs*, p. 385.

BALL *v.* BLACKWOOD, E. T. 1835. Ex. 6 D. P. C. 589; S. C. 3 M. & W. 542.

If an action be brought against acceptor and drawer, and the former escape, proceedings will be stayed on the sheriff paying the acceptor's costs only.

INDORSEE against the acceptor of a bill of exchange. A *capias* had issued against the defendant, directed to the sheriff of Worcestershire, but he had been guilty of negligence in not arresting the defendant, and proceedings were in consequence commenced against him. He subsequently applied to a Judge at chambers to stay proceedings upon payment of debt and costs, to be taxed by the Master, when an order was made to that effect.

Per Cur.—The case of *Rex v. London, Sheriff of*, (2 Bing. 227), is an authority that the sheriff is to pay no more than what the plaintiff would have recovered in an action against the acceptor.

XXIV. RELATIVE TO THE SALE OF.

GRAVES *v.* KEY, T. T. 1833. K. B. 3 B. & Ad. 313.

An indorsement, on the purchase of a bill, may be questioned by parol evidence.

A PARTY had paid the balance then due on bills to the holder, not as agent of a party liable, but with the view of becoming the purchaser of it; and a receipt of such balance was indorsed on it.

The Court held, that evidence was admissible to shew under what circumstances it was so indorsed, and by whom the money was paid; a receipt only operating as an admission, and not conclusive, except as to a party who may have been induced by it to have altered his condition.

XXV. RELATIVE TO FOREIGN BILLS.

(*a*) OF THE ACCEPTANCE OF.

FAIRLIE *v.* HERRING, T. T. 1825. C. P. 3 Bing. 625; S. C. 11 Moore, 520.

An answer, by one of several drawers of a foreign bill, that they "have the money, and the bill ought to be paid," amounts

THE defendants having sent an agent and a sub-agent to Mexico, for the purpose of purchasing interests in mines; and payments had been made, on behalf of the defendants, to carry on the transactions; and which payments were provided for by bills drawn by the sub-agent on the defendants, and with their consent; and before they could be presented for acceptance, they had transferred their interest in the mines to a company, who would have provided for the

bills; but one of the defendants requested their agent, who then acted for the company, that funds might be placed in the defendants' hands to take up the bills, stating that it would be unpleasant to have bills drawn upon their firm paid by a third party; on which it was agreed that the defendants should have the money for the purpose of paying the bills, which were left at the defendants' house for acceptance, but not accepted; and when the agent informed another of the defendants of that circumstance, he said that they had had the money, and that the bill ought to be paid.

The Court held that this amounted to a parol acceptance, and that the defendants were liable to pay the bills to an indorsee, although he had in ignorance protested these bills for non-acceptance.

to a parol acceptance.*

MENDIZABAL v. MACHADO, M. T. 1833. C. P. 3 M. & Scott, 841; S. C. N. P. 6 C. & P. 218.

IN an action on foreign bills, it appeared that the drawee, when called upon to accept, said "I will when I receive funds from France;" and, at a subsequent period, made a statement to this effect:—"I would have paid the holder, but for his intemperance."

Per Cur.—The facts shew, that the conduct of the defendant amounted to a conditional acceptance. It was, no doubt, one of an executory nature; but, at the time of the trial, the condition was complied with, and thenceforth the defendant must be considered to have virtually accepted the bills.

See Parson v. Dunlop, Cowp. 571.

A statement by a drawee, that he would have accepted bills if he had had the means, is a valid conditional acceptance.

STRAKER v. GRAHAM, H. T. 1839. Ex. 4 M. & W. 721.

IN this case, the question was, whether the plaintiff had been guilty of delay in the transmission of certain bills of exchange for acceptance to Liverpool, which were payable at sight, and drawn at Newfoundland on the 12th August in duplicate, from which place there was a daily post to St. John's, and a post-office packet from thence to England three times a week, and the voyage about eighteen days, and the bill was not presented for acceptance until the 16th November, and was dishonoured when due, and the jury found a verdict for the defendant.

The Court refused to disturb it.

A bill drawn at Newfoundland, but not presented for acceptance until near two months after it might have been, is too late.

(b) OF THE INDORSEMENT OF.

TRIMBEY v. VIGNIER, T. T. 1834. C. P. 1 Bing. N. S. 151; S. C. 4 M. & Scott, 495; S. C. 6 C. & P. 25.

ACTION on two notes made in France for 600 francs. The plaintiff in this action was the holder of two French promissory notes, of which the defendant, a Frenchman, was the maker. The notes in question were indorsed in blank by Burillon, the payee, to

In France a note cannot be indorsed in blank.

* By 1 & 2 Geo. 4, c. 78, no acceptance, except in writing, shall be binding on an inland bill.

On presentment for acceptance, the drawee said, "Accept, and you may call for it when you like;" held, these words amount to an acceptance, when used in a colony. (*Canessa v. Lands, P. C., 2 Knapp, 277.*)

A. M. Durant. Upon the trial, before *Bosanquet, J.*, the notes were produced, and their value proved in the coin of this country. The defence relied on by the defendant was, that, by the French law, the action could not be maintained without a protest, and that the indorsement, being in blank, was invalid by the 136th, 137th, and 138th *Articles of the Code de Commerce*, s. 6, “*De l’Endossement*,” and passed no property; and a French advocate, who was examined, gave evidence to that effect. It also appeared, that, when the action was brought, the defendant carried on business and resided in London; but when the notes were made and fell due, both he and the indorsee resided in France, and were French subjects. The jury found that the defendant lived in France when the notes were drawn and when they fell due; that Durant, the indorser, was also residing in France at the same time; and that, by the law of France, the indorsement being in blank was invalid, and that a protest was necessary. Upon that finding, the learned Judge directed a verdict to be entered for the defendant, reserving the questions of law, with leave to move to enter a verdict for the plaintiff on the points reserved. By consent of the parties, and by leave of the Court, evidence was given, after the verdict, that the plaintiff was in England when he received the notes.

Per Cur.—The first inquiry, therefore, is, whether this action could have been maintained by the plaintiff against the defendant in the courts of law in France. Upon this point of French law, the opinions of the foreign advocates, which have been taken by consent, since the trial of the cause, appear to be contradictory. But as each of them founds his opinion upon the *Code de Commerce*, Art. 137, 138, we feel ourselves at liberty to refer to the text of that *Code* in order to form our own judgment on the point; and, upon reference thereto, we think the language of the *Code* is clear and express, that an indorsement in blank, that is, without containing the date, the consideration paid, or the name of the party to whose order it is passed, does not operate as a transfer of the note—it is but a procuration; and the language of the *Code* being general, and unrestricted by any expressions which confine its operations to questions between the indorsee and the indorser of the note, we think, that, if an action had been brought in any of the courts of law in France against the maker of the note, it would be held not to be maintainable in the name of the plaintiff, but that he should have sued in the name of the last indorser by procuration. The question, therefore, becomes this: supposing such a rule to prevail in the French courts by the law of that country, is the same rule to be adopted by the English courts of law when the action is brought here—the law of England, applicable to the case of a note indorsed in blank of England, allowing the action to be brought in the name of the holder? The law of France does not. The action cannot be maintained.

DE LA CHAUMETTE *v.* BANK OF ENGLAND, E. T. 1831. K. B.
2 B. & Ad. 385.—S. P. BENTLEY *v.* NORTHHOUSE, E. T.
1827. N. P. M. & M. 66.

The 3 & 4

Anne, as to the

THE question in this case was, whether a Bank of England note is, by the stat. 3 & 4 Anne, c. 9, s. 1, transferrable abroad, so as to

give the person who receives it abroad, *bonà fide* and for value, a right of action in England.

Per Cur.—The note was negotiable in France; the words of the statute being, “that every such note shall be assignable or indorsable over in the same manner as inland bills of exchange are or may be, according to the custom of merchants;” and that the person “to whom such money is or shall be by such note made payable shall and may maintain an action for the same, in such manner as he might do upon any inland bill of exchange, made or drawn according to the custom of merchants.” And there could be no doubt that inland bills of exchange were negotiable in foreign countries before the statute of Anne. The place of circulation was totally immaterial.

transfer of notes, is not restricted to England; therefore authorizes a transfer abroad.

HOLDSWORTH *v.* HUNTER, H. T. 1830. K. B. 10 *B. & C.* 449.

A SET of foreign bills, drawn abroad, were sent to the drawee, who accepted two parts, and one was indorsed to the plaintiff; prior to which the other had been indorsed by the defendant to his father, conditionally, but who had never insisted on payment.

The property in foreign bills belongs to the party to whom they are *bonà fide* first transferred.

The Court held that: 1. Where the drawee of a foreign bill of exchange, drawn in sets, accepts several parts of the same set, the property in the whole, as between the different holders, belongs to the party to whom any part is *bonà fide* first transferred; 2. But the acceptor, under such circumstances, cannot resist the claim of either of the holders; and *per* Lord *Tenterden*, C. J., and *Parke*, J., it would have been the same if the first part had been indorsed and delivered unconditionally.

(c) OF THE PRESENTMENT OF.

MITCHELL *v.* BARING, M. T. 1829. K. B. 10 *B. & Cr.* 4; S. C. 1 *M. & Malk.* 381; S. C. 4 *C. & P.* 35.

A BILL of exchange was drawn in America upon a house in Liverpool, payable to the order of L. & Co. in London, and by L. & Co. indorsed to the plaintiffs, merchants at Glasgow. Before the arrival of the bill at Liverpool to be presented, the drawees failed; but the bill was duly presented and protested for non-acceptance, and notice sent to L. & Co., the payees in America; whereupon the defendants, merchants in London, accepted for honour in this form: “Accepted under protest, for honour of Messrs. L. & Co., and will be paid for their account, if regularly protested and refused when due.” When due, the bill was again presented to the drawees at Liverpool, and refused payment. It was then protested at Liverpool, and notice in due course sent to the defendants. They refused to pay, contending that, according to the body of the bill and the custom among London merchants in such cases, the protest ought to have been in London.

A foreign bill, “accepted under protest, for honour of L., to be paid when due, if presented,” must be so presented to L. the day it becomes due.

But the Court held, that, as under such special acceptance, there could not be a refusal to pay, unless there was a presentment and demand of payment, it was the duty of the plaintiff to present it to the drawees on the day it became due, and at the place where they resided, no other being designated in the bill; and that it was pro-

perly protested for non-payment at Liverpool, the usage of merchants being excluded by the terms of the special acceptance.

(d) OF THE NOTICE OF DISHONOUR.

GOODMAN v. HARVEY, E. T. 1836. K. B. 6 N. & M. 372; S. C. 4 A. & E. 870.

The notice of dishonour to the drawer of a foreign bill need not contain a copy of the protest.

IN an action on a foreign bill, it was contended that the letter communicating the notice of non-payment ought to have contained a copy of the protest, this being, as appears from *Mahoney v. Ashlin*, (2 B. & Ad. 478), necessary in a foreign bill. By the law of merchants, the protest is the only legitimate evidence of the non-payment of the bill.

Sed per Lord Denman, C. J.—There is *no* doubt that the notice was sufficient.

(e) PROTEST OF*.

(f) REMEDY ON.

TRIMBY v. VIGNIER, T. T. 1834. C. P. 1 Bing. N. C. 151; S. C. 4 M. & Scott, 695; S. C. 6 C. & P. 25.

The holder of a foreign bill cannot sue here, if, according to the law of the state where drawn, he would be incompetent to maintain an action.

A PROMISSORY note was made in France by the defendant, a French subject, and then domiciled in France. The payee of the note indorsed it in blank, which mode of indorsement is, by the sections 137, 138 of the Code de Commerce, invalid, and passes no property. The holder, an English subject, sued the defendant, the drawer, then residing and carrying on business in London.

The Court said:—The rule which applies to the case of contracts, made in one country and put in suit in the courts of law of our country, appears to be this: that the interpretation of the contract must be governed by the law of the country where the contract was made, "*lex loci contractûs*;" the mode of suing, and the time within which the action must be brought, must be governed by the law of the country where the action is brought. We, therefore, think, that our courts of law must take notice, that the plaintiff could have no right to sue in his own name upon the contract in the courts of the country where such contract was made; and that, such being the case there, we must hold in our courts that he can have no right of suing here.

See Rothchild v. Currie, MS. 1841, Q. B.

* Whenever notice of the non-acceptance of a foreign bill is necessary, a protest must also be made, which, though mere matter of form, is, by the custom of merchants, indispensably necessary. (See 2 T. R. 713; 7 East, 459; 2 Ld. Raym. 993; 1 Salk. 131).

When a foreign bill is refused acceptance or payment, it was and still is necessary, by the custom of merchants, in order to charge the drawer, that the dishonour should be attested by a protest; for, by the law of most foreign nations, a protest is, or was, essential in case of dishonour of any bill; and though by the law of England it is unnecessary in the case of an inland bill, yet, for the sake of uniformity in international transactions, a foreign bill must be protested. Besides, a protest affords satisfactory evidence of the dishonour to the drawee; who, from his residence abroad, might experience a difficulty in making proper inquiries on the subject, and be compelled to rely on the representation of the holder. It also furnishes an indorsee with the best evidence to charge an antecedent party abroad; for foreign courts give credit to the acts of a public functionary, in the same manner as a protest under the seal of a foreign notary is evidence in our courts of the dishonour of a bill payable abroad. (Byles on Bills, 166, 3rd ed.).

Birth ; Concealment of*.

REGINA v. TURNER, 1839. N. P. 8 C. & P. 755.

THE prisoner was indicted for concealing the birth of a child. It appeared, that the prisoner denied her pregnancy, and also, after the birth of the child, denied that also; but afterwards confessed to a surgeon that a child *had* been born, and he, after that, took away the after birth from her. The body of the child was, on the same day, found among the soil of the privy.

To constitute concealment some act must be done—a mere denial is not sufficient†.

Per Patteson, J.—The words of the 9 Geo. 4 are, “That, if any woman shall be delivered of a child, and *shall by secret burying, or otherwise disposing of the dead body of the said child,* endeavour to conceal the birth thereof, every such offender shall be guilty of a misdemeanour.” The prisoner, therefore, to come within this enactment, must have endeavoured to conceal the birth, by secret burying or otherwise disposing of the dead body; and I think it essential to the commission of this offence, that she must have done some act of disposal of the body after the child was dead. If she had gone to the privy for another purpose, and the child came from her unawares, and fell into the soil, and was suffocated, she must be acquitted, notwithstanding her denial of the birth of the child; because she does not come within the provisions of this act of Parliament, unless she had done something with the child after it was dead.

REX v. CORNWALL, 1817. C. C. R. & Ry. 336.

THE prisoner and one A. B. were indicted for the murder of the prisoner's bastard child. The prisoner was charged with being in labour very shortly after she had been delivered, but she said she was not; and A. B., when questioned, immediately after the child's birth, wholly denied it, although from the evidence it is clear she must have known it. The child was thrown down the privy, and the prisoner admitted that she threw it there.

It is still a concealment, although another woman know the fact;

Bayley, Justice, thought the act of throwing the child down the privy evidence of an endeavour to conceal the birth within the 43 Geo. 3, c. 58, s. 3; and left it to the jury, who found the prisoner guilty of the endeavour to conceal. *On a case reserved*, the Judges were unanimously of opinion, that the act of throwing the child down the privy was evidence of an endeavour to conceal the birth of the child, and that the conviction was right.

* Registration of regulated by the 6 & 7 Will. 4, c. 86.

† By 9 Geo. 4, c. 31, s. 14, it is enacted, “That if any woman be delivered of a child, and shall, by secret burying or otherwise disposing of the dead body of the said child, endeavour to conceal the birth thereof, every such offender shall be guilty of a misdemeanour, and shall be punished by imprisonment, with or without hard labour, for not more than two years; and it shall not be necessary to prove whether the child died before or after its birth.” It may be necessary to mention, that a woman *may* be convicted for this offence, either on an indictment for it, or, when indicted for murder of the child, she may be acquitted of the murder, and found guilty of the concealment. The costs of the prosecution are now allowed, in the same manner as in cases of felony. (1 Vict. c. 44).

REX v. DOUGLAS, 1836. C. P. *Moody*. C. C. 480.

or several persons, if she causes the child to be secretly disposed of.

ON an indictment for concealment of birth, the jury acquitted them of the murder, whereupon they were desired to inquire, whether the female prisoner was guilty of endeavouring to conceal the birth. The facts were, that the male prisoner and the female had been living together for some time; and that, on the night of the 9th, or rather about four o'clock in the morning of the 10th October, she was delivered of the child in the presence of the male prisoner, who was the father of it, and who, with his two sons, aged fourteen and ten, all slept on the *same* pallet with her; and that the male prisoner very soon afterwards put the child (which had not been separated from the after birth) into a pan, carried it down stairs into the cellar, and threw the whole into the privy, the female prisoner remaining in bed up stairs. She was proved to have said, *she knew it was to be done*. The jury found her guilty of endeavouring to conceal the birth.

The Judges were of opinion, that the communication made to other persons was only evidence, but no bar, and that the conviction was good.

REX v. HIGLEY, 1830, N. P. 4 C. & P. 366.

The concealment of birth is rebutted, if the mother had provided clothes and sent for a surgeon.

A WOMAN was delivered of a child, whose dead body was found at her father's house in a bed among the feathers. There was *no* evidence to shew *who* placed it there; but, it being proved that the woman had sent for a surgeon at the time of her confinement, and had prepared child's clothes—

Park, J., told the jury, that these facts went to negative the charge of concealment of the birth by the prisoner, and that they ought, therefore, to acquit her.

REGINA v. WRIGHT, 1841. N. P. 9 C. & P. 754.

Where the mother and aiders and abettors are acquitted of the murder, the mother *only* can be indicted for concealing the birth.

THE prisoner, Ann Wright, was charged with the murder of her child by suffocating it, and the other prisoners were charged as aiders and abettors. A surgeon was called, and *he* stated, that, in his judgment, the child must have died before it had an independent circulation. Counsel proposed to go into evidence as to the concealment, but it was apprehended, that, under the 14th section of the stat. 9 Geo. 4, c. 31, it could not affect the aiders and abettors with the concealment.

Gurney, B.—I am of opinion, that, on this indictment, no one can be convicted of the concealment except the mother of the child.

Board and Lodging.

See, also, tits. *Bastard—Husband and Wife—Infant*.

APPLETON v. CAMPBELL, T. T. 1826. N. P. 2 C. & P. 347.

No action will lie for board and lodging

IN an action for board and lodging, the defence was, that the defendant was an immodest woman, and used the lodgings for the purposes of prostitution, to the knowledge of the plaintiff.

Abbott, C. J.—If a person lets a lodging to a woman to enable her to consort with the other sex, and for the purposes of prostitution, he cannot recover for the lodging so supplied. But if the defendant had her lodgings there, and received her visitors elsewhere, the plaintiff may recover, *although she be a woman of the town.*

supplied for the purpose of prostitution*. *Alister*, if the prostitute receives no visitors where she boards and lodges.

JENNINGS v. THROGMORTON, E. T. 1825. N. P. R. & M. 251.

ASSUMPSIT for use and occupation. It was proved that the rooms were let to the defendant for the purpose of prostitution, and with a knowledge on the part of the plaintiff of that fact.

Per Abbott, C. J.—I am of opinion, that, if the plaintiff, after he became acquainted with her mode of living, suffered her to occupy the premises for the express purpose of continuing a life of prostitution, and the present demand accrued after he had acquired this knowledge of her character, that he is not entitled to recover, and that your verdict should be for the defendant.

And the landlord cannot recover rent after he is aware of her situation.

Body Rule†.

See, also, *Process—Sheriff*.

LUDD v. AMABOLDI, T. T. 1830. Ex. 1 C. & J. 97.

THE defendant was arrested on a *quo minus*, issued the 26th November, returnable the 28th, (the last day of Michaelmas Term), and, on the 11th December, put in bail, which were duly excepted

Ruling the sheriff to bring in the body is a collateral pro-

* An action is not maintainable to recover rent of lodgings knowingly let for the purpose of prostitution, from the profits whereof the landlord expected to be paid. (*Gerady v. Richardson*, 1 Esp. 13; *Crisp v. Churchill*, cited 1 B. & P. 340). So, where, in an action against a woman of the town for board and lodging, it appeared that the plaintiff, the keeper of the house of ill fame, received a portion of the gains of the prostitutes in her house, as well as payment for their board and lodging, Lord Kenyon refused to sanction such a demand. (*Frenand v. Ridges*, 1 Selw. N. P. 70, 8th ed.). But an action for clothes sold to a prostitute, (*Bury v. Bennet*, 1 Campb. 348), or for washing her apparel, (*Fores v. Johnes*, 1 N. & P. 340), cannot be defeated on the ground of the defendant being a prostitute.

† On bailable process, as soon as the writ is returned, if bail have not been put in, a rule may be obtained, or, in vacation, a Judge's order, requiring the sheriff to bring in the body: but if bail have been put in, they must first be excepted to before a rule or order can be obtained; otherwise, the proceedings will be irregular. (*Maycock v. Solymann*, 1 New. Rep. 139; *Rex v. Sheriff of Middlesex*, 7 D. & R. 264; *Rex v. Sheriff of Middlesex*, 8 T. R. 258; *Rex v. Sheriff of London*, 3 D. P. C. 387). This rule or order may, in all cases, be obtained on the day next after the writ has been returned, or on the same day, (*Pouchee v. Lieven*, 4 M. & S. 427), if the time for putting in bail have then expired. (*Rolfe v. Steele*, 2 H. Bl. 276; *Rex v. Sheriff of Middlesex*, 8 East, 525; *Hutchins v. Hird*, 5 T. R. 479; *Gore v. Williams*, 3 Anst. 653).

Formerly, the body rule could not be drawn up in vacation; but now, by R. G. H. T. 3 Will. 4, "in case a rule of Court or Judge's order for returning a bailable *capias* shall expire in vacation, and the sheriff or other officer, having the return of such writ, shall return *cepi corpus* thereon, a Judge's order may thereupon issue, requiring the sheriff or other officer, within the like number of days after service as by the practice of the Court is prescribed with respect to rules to bring in the body issued in term, to bring the defendant into Court, by forthwith putting in and perfecting bail; and if the sheriff or other officer shall not duly obey such order, and the same shall have been made a rule of Court in the term next

ceeding to bring the sheriff into contempt.

to. On the 23rd January (the first day of Hilary Term) the defendant obtained time to justify, &c.: on the 27th and on the 29th gave notice of adding and justifying bail for that day. On the 25th the sheriff was ruled to bring in the body (in six days); and the bail not having justified on the 27th, the plaintiff on that day took an assignment of the bail-bond, and issued writs thereon against the defendant and his bail. On the 30th the bail justified. In Hilary Term a rule was obtained to shew cause why the proceedings upon the bail-bond should not be set aside for irregularity.

Per Cur.—By ruling the sheriff to bring in the body before the time for justifying bail has expired, the plaintiff does not enlarge the time for justifying bail until the expiration of the body rule, if, at the period when, independently of the body rule, the time for justification expires, he takes an assignment of the bail-bond; for, by so doing, he waives the body rule. The object of the body rule is to bring the sheriff into contempt; it is a distinct and separate proceeding—*Bolland, B.*, dissentiente.

Bond*.

See, also, titles—

<i>Annuity,</i>	<i>County Clerk,</i>
<i>Arbitration,</i>	<i>Covenant,</i>
<i>Auction and Auctioneer,</i>	<i>Debtor and Creditor,</i>
<i>Bail,</i>	<i>Deed,</i>
<i>Bankrupt,</i>	<i>Forgery,</i>
<i>Bastard,</i>	<i>Post Obit Bonds,</i>
<i>Bottomry and Respondentia</i>	<i>Replevin,</i>
<i>Bonds,</i>	<i>Stock,</i>
<i>Composition with Creditors,</i>	<i>Trade Contracts, in respect of</i>
<i>Contribution,</i>	<i>—Warrant of Attorney.</i>

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II. RELATIVE TO THE STAMP, p. 398.

III. RELATIVE TO THE PARTIES, p. 402.

following, it shall not be necessary to serve such rule of Court, or to make any fresh demand thereon, but an attachment shall issue forthwith for disobedience of such order, whether bail shall or shall not have been put in and perfected in the mean time."

* A bond or obligation is a deed, whereby a person obliges himself, his heirs, executors, and administrators, to pay to another person a certain sum of money on an appointed day. The party binding himself is called the obligor, and the obligee is the person to whom the money is to be paid; but bonds generally contain a condition, that, on payment of the sum mentioned therein, or in the event of the obligor performing a certain act on the day mentioned, the bond shall be void; and the obligor in such bond shall subject himself to a penalty in case the condition is not performed. (*Perk. Fait*, 119; *Co. Litt.* 172 a.; *Bac. Abr. Obligation*; *Cruise, Dig.* IV. 99; *Yelv.* 194). This instrument is distinguishable from an indenture, which is *inter partes*, by its being obligatory only on the obligor, and

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requiring only one seal, expressive of the assent of the party intended to be bound by it; it is, therefore, polled or shaven smooth at the edges. (Lit. 370, 371, 372; Co. Litt. 55, 229 a. (in n.); Plowd. 134, 421). These instruments being merely acknowledgments of a debt it is not necessary that they should be expressed to be deeds, but may be in any form, if the language will admit a construction, that the party making it intended to acknowledge his liability. (Bro. Abr. 67; Co. Litt. 137, 139). Therefore, a letter of attorney, (3 Mod. 153; S. C. Comb. 87), and an acknowledgment written on a page of a book, whereto a seal was affixed, (Cro. Eliz. 613), have been respectively holden to constitute good bonds.

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I. RELATIVE TO THE FORM* AND EXECUTION OF, AND OF THE PENALTY.

DOE *d.* GARNONS *v.* KNIGHT, T. T. 1826. K. B. 5 B. & C. 671; S. C. 8 D. & R. 348.

A delivery to a third person for the use of the obligee is a sufficient delivery.

W. BEING greatly indebted to G., the latter had, in a communication on the subject, expressed that he relied and expected that W. would provide securities for the debt, and W. promised to make him secure, and shortly after executed with proper and apt words a mortgage-deed in the presence of his niece, which she attested; W. took away the deed with him, but shortly after delivered it to her, stating that it belonged to G., and desiring her to put it by; it remained with her until W.'s death, G. being wholly ignorant of it until after that event. The Judge directed the jury to say—1st, whether it was duly executed; and, 2ndly, whether the delivery to the niece was a parting with the possession, and of the power

* As a bond is, in the eye of the law, only an acknowledgment of a debt, it is not necessary that any technical words should be used in such an instrument, if it can be collected from the circumstances and tenor of the language, that the obligor intended to hold himself bound to the obligee. (2 Roll. Abr. 146, E. 37). Where a bond appeared to have been signed and sealed, and was attested in the usual form, as "signed, sealed, and *delivered*:"—Held, that it was sufficient to raise the presumption, that every thing necessary was done, although the witness could not speak to the delivery. (*Ball v. Taylor*, T. T. 1824, N. P., 1 C. & P. 417).

and control over it, for the benefit of G.; that, if only for custody for W., it would not be a good delivery. The jury having found for the plaintiff on a former trial in the affirmative: on motion for a new trial—

Per Cur.—There can be no question, that a delivery to a third person for the use of the party in whose favour it is made, where the grantor parts with all control over the deed, makes the deed effectual from the instant of the delivery. The law will presume, if nothing appear to the contrary, that a man will accept what is for his benefit; and Lord Ellenborough lays that down as a rule. In this case there is a very strong ground for presuming Gs.' assent, for there is his declaration, that he relied and expected that W. would provide him a security for his money; and he, W., had given an answer importing that he would. Sheppard, in his *Touchstone*, who is particularly strict in requiring that the deed should pass from the possession of the grantor, (and more strict than the cases in general imply to be necessary), lays it down, that delivery to a grantee will be sufficient, or to any one whom he has authorized to receive it, or delivery to a stranger for his use and on his behalf; and 2 Rolle's Abr. 24; Dyer, 167; 2 Leonard, 111; Cro. Eliz. 54; 3 Coke, 27, are clear authorities, that, if there is a delivery to a stranger for the use and on the behalf of the grantee, the deed will operate instantan, and its operation will not be postponed till it is delivered over to or accepted by the grantee. The passage in Rolle's Abridgment is this:—"If a man make an obligation to I., and deliver it to B., if I. get the obligation he shall have an action on it, for it shall be intended that B. took the deed for him as his servant;" and in the 3 Hen. 6, c. 27, the point is put arguendo, by Serjeant Paston, who adds—"for a servant may do what is for his master's advantage; what is for his disadvantage he cannot do."

INGLEBY v. SWIFT, T. T. 1833. C. P. 10 Bing. 84.

DEFENDANT, with two others, entered into a bond in the penal sum of 1000*l.*, conditioned for the payment of rent, observance of covenants, &c.: it recited, amongst other things, that the plaintiff and defendant had agreed to execute a bond in the penalty of 500*l.* for the payment of rent, observance of covenants, &c. In an action on the bond first mentioned, and verdict for the plaintiff for 750*l.*, due for rent; a motion was made to reduce the verdict to 500*l.*, the penalty in the second bond agreed to be executed—

The Court held, that the penalty of the bond, on which the plaintiff sued, could not be cut down or restricted by the penalty of the bond to which the recital was alleged to refer.

A mere recital in the condition cannot reduce the penal sum*.

* Where a bond was given in a penalty, for the purpose of securing such a sum as, with certain rents and dividends of settled property, would make up to the plaintiffs a certain annual income:—Held, that the Court would consider the recital as evidence of an agreement, and would not limit the relief it gave against the assets of the deceased obligor to the amount of the penalty. (*Jendwine v. Agate*, (Chancery), 3 Sim. 129).

II. RELATIVE TO THE STAMP*.

LLOYD v. HEATHCOTE, H. T. 1833. Ex. 1 C. & M. 336.

A bond to secure a banker for advances, limiting the sum to 1000*l*. only requires a 5*l*. stamp.

A BOND given by a country customer to bankers in London, with a condition reciting a request by the obligors to the obligees to pay from time to time bills of exchange, &c., and binding the obligors to pay, or remit cash, &c. to pay and discharge such bills of exchange, at or before such bills of exchange should become due; and from time to time to settle accounts, and to pay such sums as upon the settling of such accounts should be found due and owing to the obligees, subject to the proviso, that “the whole amount of monies to be ultimately recoverable by virtue of the said obligation should not exceed the sum of 1000*l*.”

* By the 55 Geo. 3, c. 184, a duty is imposed on any bond in England, and personal bond in Scotland, given as a security for the payment of any definitive and certain sum of money:—

		DUTY.	
		£	s. d.
Not exceeding.....	£50	1	0 0
Exceeding ..	£50 and not exceeding 100	1	10 0
— ..	100	2	0 0
— ..	200	3	0 0
— ..	300	4	0 0
— ..	500	5	0 0
— ..	1,000	6	0 0
— ..	2,000	7	0 0
— ..	3,000	8	0 0
— ..	4,000	9	0 0
— ..	5,000	10	0 0
— ..	10,000	15	0 0
— ..	15,000	20	0 0
— ..	20,000	25	0 0

Bond in England, and personal bond in Scotland, given as a security for the repayment of any sum or sums of money to be thereafter lent, advanced, or paid, or which may become due upon an account current, together with any sum already advanced or due, or without, as the case may be:—

Where the total amount of the money secured, or to be ultimately recoverable thereupon, shall be uncertain and without any limit. 25 0 0

And where the money secured, or to be ultimately recoverable thereupon, shall be limited not to exceed a given sum { The same duty as on a bond for such limited sum.

Bond in England, and personal bond in Scotland, given as a security for the transfer, or re-transfer, of any share in any of the government or parliamentary stocks or funds, or in the stock and funds of the Governor and Company of the Bank of England, or of the East India Company, or of the South Sea Company { The same duty as on a bond for a sum of money equal to the value of the stock or fund secured according to the average price thereof, on the day of the date of the bond, or on either of the ten days preceding.

Heritable bond in Scotland, for any of the purposes aforesaid. See tit. Mortgage.

Bond in England, and personal bond in Scotland, given as a security for the payment of any sum of money, or for the transfer, or re-transfer, of any share in any of the stocks or funds before mentioned which shall be in part secured by a mortgage or wadset, or other instrument or writing hereinafter charged with the same duty as a mortgage or wadset, bearing even date with such bond, or for the performance of covenants contained in such mortgage or other instrument, or writing, or for both those purposes 1 0 0

Per Cur.—Here is a bond in which it is declared, that the whole amount of monies to be ultimately recoverable shall not exceed the sum of 1000*l.*, and to this bond there is affixed a 5*l.* stamp. What the sum secured or ultimately recoverable is to be, the bond states in express terms, and in language calculated to meet the act of parliament. The whole amount secured and to be ultimately recover-

Bond in England, and personal and heritable bond in Scotland, given as the only or principal security for the payment of any annuity upon the original creation and sale thereof. See 55 Geo. 3, c. 184, <i>Div. Conveyance upon the Sale of Lands, &c.</i>	£	s.	d.
Bond in England, and personal bond in Scotland, given as a collateral or auxiliary security for the payment of any annuity upon the original creation and sale thereof, where the same shall be granted or conveyed, or secured, by any other deed, liable to and charged with the ad valorem duty hereinafter imposed on conveyances upon the sale of any property	1	0	0
Bond in England, and personal and heritable bond in Scotland, given as a security for the payment of any annuity, except as aforesaid, or of any sum or sums of money at stated periods (not being interest for any principal sum, nor rent reserved or payable upon any lease or tack), for the term of life, or any other indefinite period, so that the whole money to be paid cannot be previously ascertained.			
Where the annuity or sum secured shall <i>not</i> amount to 10 <i>l.</i> per annum	1	0	0
And where the same <i>shall</i> amount to 10 <i>l.</i> and not amount to 50 <i>l.</i> per annum	2	0	0
And where the same shall amount to 50 <i>l.</i> and not amount to 100 <i>l.</i> per annum	3	0	0
And where the same shall amount to 100 <i>l.</i> and not amount to 200 <i>l.</i> per annum	4	0	0
And where the same shall amount to 200 <i>l.</i> and not amount to 300 <i>l.</i> per annum	5	0	0
And where the same shall amount to 300 <i>l.</i> and not amount to 400 <i>l.</i> per annum	6	0	0
And where the same shall amount to 400 <i>l.</i> and not amount to 500 <i>l.</i> per annum	7	0	0
And where the same shall amount to 500 <i>l.</i> and not amount to 750 <i>l.</i> per annum	9	0	0
And where the same shall amount to 750 <i>l.</i> and not amount to 1000 <i>l.</i> per annum	12	0	0
And where the same shall amount to 1,000 <i>l.</i> and not amount to 1,500 <i>l.</i> per annum	15	0	0
And where the same shall amount to 1,500 <i>l.</i> and not amount to 2,000 <i>l.</i> per annum	20	0	0
And where the same shall amount to 2,000 <i>l.</i> per annum or upwards	25	0	0
But where there shall be both a personal and heritable bond in Scotland, in separate deeds of the same date, for securing any such annuity, or sums payable at stated periods, and the ad valorem duty above charged thereon shall amount to 2 <i>l.</i> or upwards, the heritable bond only shall be charged with the ad valorem duty, and the personal bond shall be charged only with the duty of	1	0	0
Bond (commonly called counter-bond) in England, and personal bond of relief in Scotland, for indemnifying any person who shall have become bound or engaged as surety, or cautioner for the payment of any sum of money or annuity, or for the transfer of any share in any of the stocks or funds before mentioned	1	15	0
Bond in England, and personal bond in Scotland, for the due execution of an office, and to account for money received by virtue thereof	1	15	0
Bond given pursuant to the directions of any act of Parliament, or by the direction of the commissioners of customs or excise, or any of their officers, for or in respect of any of the duties of customs or excise, or for preventing frauds or evasions thereof, or for any other matter or thing relating thereto	1	0	0
Bond entered into by any person on obtaining a marriage license ..	1	0	0

able does not exceed 1000*l.*, and the duty on a bond limited to sums not exceeding that amount is 5*l.* The words "ultimately recoverable" seem to us to be adapted to meet the case of a security for a floating balance, which can be enforced but once; and, therefore, although an account is kept with a banker from year to

	£	s.	d.
Bond on obtaining letters of administration in England, or a confirmation of testament in Scotland	1	0	0
Bond accompanied with a deposit of title-deeds, for making a mortgage, wadset, or other security, on any estate or property therein comprised. See tit. <i>Mortgage</i> .			
Back-Bond, declaration, or other deed in writing, for making redeemable any disposition, assignation, or tack, apparently absolutely, but intended only as security. See tit. <i>Mortgage</i> .			
Bond in England, and personal bond in Scotland, of any kind whatever, not otherwise charged in this schedule, nor expressly exempted from all stamp duty	1	15	0
Heritable bond in Scotland, of any kind whatever, not otherwise charged in this schedule, nor expressly exempted from all stamp duty.....	1	15	0

General directions respecting Bonds.

Where any such bond as aforesaid, together with any schedule, receipt, or other matter, put or indorsed thereon, or annexed thereto, shall contain 2160 words or upwards, there shall be charged for every entire quantity of 1080 words contained therein, over and above the first 1080 words, a further progressive duty of..... 1 5 0

And where any such bond as aforesaid shall be given as a security for the payment of a sum of money, and also of a share in any of the stocks or funds before mentioned, or an annuity, or both, or for the payment of an annuity, and also of a share, in any of the said stocks or funds, the proper *ad valorem* duty shall be charged in respect of each.

And where any such bond as aforesaid shall be given as a security for the payment or transfer to different persons of separate and distinct sums of money, or annuities or shares in any of the stocks or funds before mentioned, the proper *ad valorem* duty shall be charged in respect of each separate and distinct sum of money, or annuity, or share in any of the said stocks or funds therein specified or secured, and not upon the aggregate amount thereof.

And where any bond in England shall be given as a security for the performance of any covenant or agreement for the payment or transfer of any sum of money, or annuity, or any share in any of the stocks or funds before mentioned, such bond shall be charged with the same duty as if the same had been immediately given for the payment or transfer of such money, or annuity, or share in the said stocks or funds.

And where in England any bond for the payment, or transfer, or for the performance of any covenant for the payment or transfer of any sum of money, or annuity, or any share in any of the stocks or funds before mentioned, shall be contained in one and the same deed or writing with any other matter or thing in this schedule specially charged with any duty, (except any declaration of trust of the money, annuity, stock, or fund, secured), such deed or writing shall be charged with the same duties as such bond and other matter or thing would have been charged with, if contained in separate deeds.

But where, in England, a bond for the performance of covenants or agreements (other than for the payment or transfer of any sum of money, or annuity, or any share in any of the said stocks or funds), shall be contained in the same deed or writing with any other matter or thing, the same shall not be charged separately, but the whole shall be considered as one deed, and be charged accordingly under its proper denomination.

Exemptions from the preceding and all other Stamp Duties.

Bonds of the Royal Exchange and London Assurance Corporations exempted from stamp duty by the act of 6 Geo. 1, under which they were incorporated.

Bonds and other securities exempted from stamp duty by the 26 Geo. 3, c. 81, s. 31, or any other act now in force for the encouragement of the British fisheries.

year, and many sums are advanced, still the sum "ultimately recoverable" is the limited amount upon which the stamp duty is to be imposed.

DICKSON *v.* CASS, T. T. 1830. K. B. 1 *B. & Ad.* 343.

THIS was a bond conditioned for securing 1000*l.*, interest, and banker's charges of commission, stamped with only a 5*l.* ad valorem stamp, as a bond to secure a sum exceeding 500*l.*, but not exceeding 1000*l.*, according to the Stamp Act, 55 Geo. 3, c. 184.

But if the bond includes commission and interest, a 5*l.* stamp is too small*.

Per Cur.—The question as to the stamp was, whether the bond was to be considered as one given to secure a sum of money exceeding 500*l.*, but not exceeding 1000*l.*, within the 55 Geo. 3, c. 184, Schedule, part 1, tit. "*Bond.*" According to the recital and the condition, the bond was to be a security, not only for the sum of 1000*l.* actually advanced, but also for such commission as the bankers usually charge on such advances. The sum payable as commission (whatever it may be) must be ultra the sum of 1000*l.*; therefore the stamp, being that required for no more than 1000*l.*, is too low; the stamp is, therefore, insufficient, independent of the interest.

BARKER *v.* SMARK, H. T. 1841. Ex. 7 *M. & W.* 590; S. C. 9 *D. P.* 211.

DEBT on a bond, dated in June, to recover 3000*l.* with interest at 5*l.* per cent. from 1st March preceding. The bond was im-

Although a bond be payable

Bond exempted from stamp duty by the act of the 28th year of his late Majesty's reign, or any other act now in force relating to the exportation of wool, or any manufacture thereof, or fuller's earth, fulling clay, or tobacco-pipe clay, or by the act of the 29th year of his late Majesty's reign, or by any other act now in force relating to the exportation of tobacco from his Majesty's warehouses.

Coast bonds, or bonds relative to the carrying of goods and merchandize coastwise, whether the same shall be given pursuant to the act of the 32nd year of his Majesty's reign, or any other act now in force, for the relief of the coast trade of Great Britain, or pursuant to the directions of any proclamation or order in council, by his Majesty, his heirs, or successors.

Bonds and other securities exempted from stamp duty by the act of the 32nd year of his late Majesty's reign, or any other act now in force, for the encouragement of friendly societies.

Bonds given by cardmakers for securing the stamp duties on playing cards.

Bonds given by the proprietors, printers, or publishers of newspapers for securing the payment of the duties upon the advertisements therein contained.

Bonds given by stationers and others who sell stamped paper for the printing of newspapers, for the due performance of the matters required of them by the act passed in the 38th year of his late Majesty's reign, for regulating the printing and publication of newspapers.

Bonds given by collectors of assessed taxes and their sureties for the due payment of monies collected by them, or otherwise relating to their offices.

Administration and confirmation bonds, given by the widow, child, father, mother, brother, or sister of any common seaman, marine, or soldier, who shall be slain or die in the service of his Majesty, his heirs, or successors.

Administration bond in England, given by any person where the estate to be administered shall not exceed 20*l.* in value.

Confirmation bond in Scotland, where the whole personal estate of the deceased shall not exceed 20*l.* in value.

* A bond conditioned for payment of a sum of money to the obligee on a day named according to a proviso contained in a conditional surrender of even date, whereby A. (not the obligor in the bond) surrendered to the obligee certain copyhold lands for securing payment of the same sum, was held to require a 1*l.* stamp, although it bore no stamp denoting the payment of the ad valorem duty on the surrender, and the latter was not produced. (*Quin v. King*, H. T. 1836, Ex., 1 *M. & W.* 42; 4 *D. P. C.* 736; S. C. 1 *T. & G.* 407).

with interest antecedent to the date, a stamp for the principal money is sufficient*.

pressed with a 7*l.* stamp. It was objected at the trial, on behalf of the defendant, that this stamp was not sufficient, as the bond being given in June to secure the interest previously due, was in fact given to secure 3000*l.* plus the interest from the 1st March to the date of the bond.

Per Cur.—The stamp is sufficient. The words “definitive and certain sum” cannot correctly apply to interest, the amount of which depends on the length of time which elapses before the money is repaid. The stamp to be imposed is to be in proportion to the principal sum secured.

COLLINS v. GWYNNE, H. T. 1833. C. P. 9 *Bing.* 544; S. C. 2 *M. & Scott*, 640.

The general exemption in the Stamp Act, 43 Geo. 3, c. 99, applies to a bond given by a collector of taxes, though not duly following the directions of the statute†.

THE plaintiffs declared upon a bond, which was dated the 27th August, 1828, as having been entered into by the defendant together with R. Brigg and one Samuel Cordozo, jointly and severally, to the plaintiffs, as three of the commissioners under the Land Tax and Assessed Taxes Acts for the Tower Division in the county of Middlesex, in the penal sum of 4048*l.* The execution of the bond was admitted at the trial, subject to a question reserved as to the necessity of a stamp, which it had not, although, as to the penalty and condition, it was not conformable to the requisitions of 43 Geo. 3, c. 99.

Per Cur.—The objection, on the ground of the want of a stamp, rests on the argument, that this bond cannot be held to be within the exemption of the general Stamp Act (55 Geo. 3, c. 184), “as a bond given by collectors of assessed taxes and their sureties for the due payment of monies collected by them, or otherwise relating to their offices,” because it is not a bond given in conformity with the directions of the 43 Geo. 3, c. 99, s. 13, nor with those of 3 Geo. 4, c. 88. It is argued, that the bond is not authorized by the former act, inasmuch as the penalty exceeds the amount of the duty assessed for the district; we think, however, the direction of the 13th section of that act, that the collector should give security to the commissioners “equal to the amount of the whole duty and sums of money assessed in and to be collected in each district or place,” is virtually complied with by a security given in such sum as is large enough to include, though it may exceed the exact amount of, such duties. Such is the natural meaning of the words above referred to; and if any other meaning had been intended, we think the form of expression usually met with in acts of the Legislature, of a sum “not exceeding the amount” &c., would not fail to have been employed.

III. RELATIVE TO THE PARTIES‡.

* A bond conditioned for a certain sum payable at a distant day, with interest in the mean time, requires only a stamp equal to the amount of principal, and not including the interest. (*Parke, J.—Foreman v. Jeyes*, H. T. 1833, N. P. 5 C. & P. 419).

† In debt on a bond conditioned to pay a sum secured to be paid by a certain indenture:—Held, that it was necessary to produce the deed, in order to see whether it was such as to require an ad valorem stamp to exempt the bond from a higher stamp than 1*l.* (*Walmesley v. Brierly*, 1836, N. P., 1 *M. & Rob.* 529).

‡ All persons having legal capacity to contract, in general, may bind themselves in bonds and obligations. (See 5 Co. 119; 4 Co. 124; Roll. Abr. 340).

IV. RELATIVE TO CONTRACTS CONTROLLING OR VARYING THE BOND.

LAINSON *v.* TREMERE, T. T. 1834. K. B. 3 N. & M. 603.

THE obligor executed a bond conditioned for payment of the rent of 170*l.* according to the terms of a lease, &c., in which, when set out on oyer, it appeared that the rent was only 140*l.*—

Per Cur.—If the condition of a bond contain a general obligation, the party is not estopped; but, if it have reference to a particular thing, he is estopped from saying that there is no such thing. Thus, an obligor is estopped from denying that there is such a lease as is recited in the bond. Where a bond, reciting a lease with a reservation of 170*l.* rent, is conditioned for payment of 170*l.* rent, the defendant is estopped from setting out a lease which contained a reservation of 140*l.* a year rent, with an averment of the payment of that rent, because that virtually was a denial that any such lease as that recited in the bond existed.

The amount stated in a bond cannot be varied, though to secure performance of another deed, where the sum is different*.

V. RELATIVE TO THE CONSIDERATION†.

DAVIDSON *v.* FRANKLIN, T. T. 1830. K. B. 1 B. & Ad. 142.

ON motion to set aside a warrant of attorney, it appeared that the defendant, by his bond bearing date the 8th July, 1828, became bound to the plaintiff in the penal sum of 4000*l.*, conditioned for the payment of 2000*l.* on the 8th July, 1830, with interest at 5 per cent. payable half-yearly; and, at the same time, gave a warrant of attorney to confess judgment. The bond debt, secured by the judgment, had been purchased of the plaintiff by one F. Seager on the 12th December, 1828. Before he purchased it, his attorney had produced the bond to the defendant, and informed him that it had been offered to Seager for sale; and he then asked the defendant whether he admitted it to be a good debt, and whether it was given for a good and valuable consideration. The defendant looked at the signature and replied: "Yes, this is my handwriting; I owe Mr. Davidson the money, and have no objection to keep to it; it will be paid when it is due."

An obligor, who states to a purchaser that the bond is a valid document and will be paid, cannot set up a defence shewing it to be void.

Per Cur.—This is an application to the discretion of the Court, which ought to be exercised so as best to advance the ends of justice; and we think that, according to the maxim that no man ought to be permitted to allege his own misconduct, we ought not to make this

* Where the obligor gave a memorandum, that, if the interest on the money were regularly paid, it was not his intention to call in the amount for four years from the date thereof:—Held, that it amounted to a binding undertaking; and that, by acceptance of the interest after the stated days without objection, it was to be taken to be a regular payment. (*Norton v. Wood*, (Chancery), 1 Russ. & M. 178).

† Where the condition of a bond is originally impossible, the bond is absolute. Where the condition is originally illegal, the bond is void. Where the condition subsequently becomes impossible by the act of the obligor, or of a stranger, the bond is forfeited. Where it becomes impossible by the act of the obligee, the bond is saved. (*Anon.* cited in *Beswick v. Swindells*, in error, 3 Nev. & M. 378; S. C. 3 A. & E. 866).

rule absolute. Here, the defendant stated to the agent of the party who purchased the debt that it would be paid. If we made this rule absolute, we should enable the defendant to defeat the judgment by his own fraud and misconduct, and to injure a person who advanced money upon the faith that his representation was true.

MORTON *v.* BURN, H. T. 1838. K. B. 2 N. & P. 297.

A promise by the obligor of a bond to pay the assignee in consideration of forbearance, is binding.

IN an action by assignee of a bond on a promise to pay at a given time in consideration of forbearance to sue—

Per Cur.—The question is, whether forbearance for a given time, on the part of the assignee of a bond, to sue the obligors is a good consideration for a promise by the obligors to pay the assignee at the expiration of that time or give him a warrant of attorney for the amount. It was objected, that there is no mutuality in the agreement, for that, if the plaintiff had sued the defendants in the obligee's name, the promise to forbear would have been no answer. Again, that this is a mere nudum pactum, being only a promise to do that which the defendants were already bound to do by their bond; and further that, if this promise be binding, it amounts to varying a deed by parol contract, which is contrary to the rule of law. But we are of opinion, 1st, that there was sufficient mutuality and good consideration for the promise; 2ndly, that the plaintiff being a third party, and sustaining detriment by forbearing to enforce his right to sue in the name of the obligee, the promise was not nudum pactum; and, lastly, that the bond being forfeited before agreement, it was in no respect renewed by the parol contract entered into between the plaintiff and defendant.

NYE *v.* MOSELEY, M. T. 1826. K. B. 6 B. & C. 133; S. C. 9 D. & R. 165.

A bond given for past cohabitation, as a provision for the female and her children, is not considered invalid by shewing that the obligor was married, and the fact known to the obligee.

A CASE from the Vice-Chancellor disclosed the following facts: that John Moseley was, at the time of the said Sophia Nye becoming his servant, and has ever since continued to be, a married man living with his wife, but had, at the time aforesaid, ceased to have sexual intercourse with his wife, by medical advice. In the course of the year 1810, a cohabitation took place between the said John Moseley and the said Sophia Nye, previously to which the said Sophia Nye had always conducted herself with propriety and morality; and she continued to live in the said John Moseley's family and cohabit with him until the year 1812, when he provided and fitted up a cottage for her in the neighbourhood of his residence, and she removed to and resided at such cottage, and cohabited with him there, until the year 1816. In the course of such cohabitation the said Sophia Nye was delivered of one child, and was at the determination thereof in a state of pregnancy, and has since been delivered of another child. In the year 1816 the said John Moseley determined such cohabitation; he executed a bond to the said Sophia Nye, conditioned for the payment of an annuity of 100*l.* to her for the term of her natural life, and for the payment of 500*l.* each to the said children at his death. The annuity is unpaid for one year.

Mr. Justice Bayley.—Clearly, as a general rule, it may be taken that a bond given with the view to put an end to such an intercourse is good. Whether it is good when the intercourse itself is adul-

terous may be another question. In a court of law it may be difficult to weigh the different degrees of immorality; but at present, I think, there are some circumstances in this case to distinguish it from *Priest v. Parrott*, 2 Ves. 166. Besides, why should it be thought necessary to file a bill in equity for relief against such a bond, if it is void and unavailable at law? The following certificate was afterwards sent:—"We have heard this case argued, and are of opinion, that the circumstances of this case do *not* afford to the said John Moseley a good ground of defence at law."

GREVILLE v. ATKINS, E. T. 1829. K. B. 9 B. & C. 462.

A BOND, after reciting that A. B. was colonial secretary of Tobago, and had appointed C. D. to be his deputy, to execute the office, and receive the fees, in consideration of his paying thereout to A. B. the annual sum of 450*l.*, by equal half-yearly payments, was conditioned for the punctual payment of that sum, (without saying "out of the fees"); and defendant pleaded that the bond was given in pursuance of an agreement to pay that sum *at allevents*; upon which issue was taken, and the jury found that the sum of 450*l.* a-year was to be paid absolutely, whether the fees were more or less, and that the fees of the office did, after deducting the expenses, exceed the sum of 450*l.* annually.

The Court held, that it was competent to the defendant to plead, and the jury to find the fact, that the sum was to be paid out of the fees, and that they exceeded the amount, in order to shew the illegality of the bond; the fact found not being so inconsistent with the bond that it must be rejected.

But where the condition of the bond was to execute an office as deputy, and receive fees, and to pay the obligee a specific sum:—Held, that it might be shewn that the sum was to be paid out of the fees, and that they exceeded the amount, in order to establish its illegality.

VI. RELATIVE TO THE OBLIGATORY PART OF THE BOND.

COLES v. HULME, M. T. 1828. K. B. 8 B. & C. 568.'

DECLARATION, in an action of debt on bond, stated that the defendant acknowledged himself to be bound in the sum of 7700*l.* Plea, *non est factum*. On the trial it appeared, that in the bond the word "pounds" was omitted. The condition was for the payment of several sums amounting to 4859*l.* 1*s.* 3½*d.*

Per Lord Tenterden, C. J., and Bayley, J.—We agree that conjecture or probability is not sufficient to justify us in making an intendment like that which is required to connect this bond with the plaintiff's declaration. We think there should be a moral certainty as to what was the intention of the obligor; but we think there is enough in the bond, taken with the condition, to lead to that certainty. The bond alone speaks of 7700, without saying of what; but, it is said, this might mean guineas, marks, shillings, and so on. It might. Let us then look at the condition; what says the condition? Why, it speaks of various sums, amounting in the whole to 4852 pounds. Surely then, the bond, which is for a penal sum, must be for a sum larger than that mentioned in the condition. But what description of sum—guineas, pounds, or marks? We have not calculated whether 7700 marks would satisfy 4859 pounds; and we think it is immaterial. What is the language used by the parties throughout,

The omission of the word "pounds" in the obligatory part of a bond will be supplied by intendment.

when speaking of a sum intended to represent the aggregate of the fractional parts? Why, it is *pounds*—so many pounds, so many shillings, and so many pence; there is nothing said about guineas, or marks, or about any other coin but pounds, shillings, and pence. Then, when we look at this bond, and see 7700 mentioned, we think it is morally certain that the word was left out by mistake—for *some* word has undoubtedly been left out, and a word representing money, which is to cover 4859 pounds—our minds arrive at the moral certainty that it is the word “pounds” which is omitted.

Mr. Justice *Littledale*.—I have no doubt in my own mind that the word “pounds” was intended, but I am not prepared to say that it is a necessary consequence that we should supply so very material a word. I entertain strong doubts upon the point; and I should rather say that we ought not to supply the word.

VII. RELATIVE TO THE CONDITION.

(a) HOW CONSTRUED.

EVERETT v. EYRE, T. T. 1824. C. P. 2 *Bing.* 166; S. C. 9 *Moore*, 326.

When bond conditioned to pay money forthwith, question for the jury whether satisfied accordingly or not.

THE plaintiffs being treasurers and shareholders of the Stone Pipe Company, with whom they were greatly in advance, and also treasurers and shareholders of a water company, (on the shares only 30*l.* per share had been paid), had sold to the latter company pipes of the former to a considerable amount; and, to effect the payment, had entered up in their books as paid the remaining 70 per cent. on the shares of the latter, and afterwards transferred to their own account enough to discharge their own debt with the former. They subsequently sold certain shares in the latter company, and took a bond, to which defendant was a surety, for securing the payment of the amount, reciting that 30 per cent. had been already paid, and that the plaintiffs “had agreed to pay up and complete the remaining instalments *forthwith*,” the condition being for payment of the amount of the shares, together with interest thereon from the time of this advance in payment thereof by the plaintiffs.

The Court held, that it was properly left to the jury to say if the remaining instalments had been in any way satisfied, it being immaterial whence the money came, the instrument itself shewing that the plaintiffs were under an engagement to pay them forthwith.

BATSON v. SPEARMAN, H. T. 1840. Q. B. 3 *P. & D.* 77; S. C. 9 *Ad. & E.* 298.

A bond to secure the payment of all such sums as the plaintiffs or any future partners should advance, is a continuing security*.

DEBT against one of the obligors of a joint and several bond. By the condition, (which recited an agreement by the plaintiffs, a banking firm, to discount bills and otherwise advance to one of the obligors any sums of money, not exceeding at any one or more time or times 200*l.*, upon security), the bond was to be void if the obligors, or any or either of them, should pay to the plaintiffs and any other person who should become a partner in the firm all such sums, not exceeding 200*l.*, as the plaintiffs or any future partner should ad-

* The nature of the duty of the obligor and the character of the obligee will be

vance the obligor on bills, &c., which he might from time to time draw upon plaintiffs or get discounted by them, within three months after notice to pay such sums. Plea: payment by Rutherford according to the form and effect of the condition. Replication: that, after making the said writing obligatory, plaintiffs advanced and paid divers sums, amounting to 200*l.*, on account of paying divers bills, &c., which Rutherford had drawn on plaintiffs, and on account of paying other bills, &c., made payable by Rutherford at plaintiffs' banking-house; that a large sum, to wit, 200*l.*, on account of the monies so advanced and paid by plaintiffs, and of interest thereon, was, at the time of giving the notice thereafter mentioned, due from Rutherford, "whereof the defendant, three calendar months before the commencement of this suit, to wit, on &c., had and received notice." Averment of non-payment by the defendant or his co-obligors. Verification. Rejoinder: that, after making the writing obligatory, plaintiffs advanced and paid divers sums on account of paying divers bills, &c., which Rutherford then drew on plaintiffs, and on account of paying divers other bills, &c., which Rutherford then made payable at the banking-house of plaintiffs; that the last-mentioned sums so paid by plaintiffs amounted to 200*l.*; that Rutherford, according to the condition of the writing obligatory, repaid to plaintiffs the last-mentioned sums to the amount of 200*l.*; and that the sums of money alleged in the replication to have been advanced and paid by plaintiffs were paid after the sums mentioned in the rejoinder had been so advanced and paid by plaintiffs, and also after the same had been so repaid by Rutherford. Verification. General demurrer.

The Court held, 1st, that the bond was a continuing security; 2nd, that an averment that 200*l.* was *due*, and that notice thereof had been given to the defendant, was no notice to him to pay; and so the non-payment by him no breach of the condition shewn; and that this objection was open on general demurrer.

(b) PERFORMANCE OF*.

regarded as explanatory of the intent of the parties. (*Saunders v. Taylor*, H. T. 1829, K. B., 9 B. & C. 35; Abr. post, tit. *Sewers*).

A condition in a bond for A. to assess every two months damages to the lands of the obligee occasioned by mining, is imperative and not discretionary. (*Stephens v. Lowe*, T. T. 1832, C. P., 9 Bing. 32; Abr. tit. *Arbitration*).

Where money was advanced by bankers in London to a partner in a banking firm in Ireland, and bonds were executed in Dublin for the amount, in sums of £——sterling, "with legal interest," and warrants of attorney for entering up judgment in the King's Bench in Ireland recited the sums in the same terms as the bonds; credit was given in the books on the English banking-house for the full sum, and bills accepted by them drawn by the banking company in Ireland:—Held, that the debt was payable in English currency and with Irish interest. (*Noel v. Rochfort*, Dom. Proc. 13 Bli. N. S. 483).

* A condition of a bond referred to money in the then 4 per cent. Bank Stock; that stock was afterwards reduced to 3½ per cent.:—Held, that the condition of the bond was satisfied, and that payment might be enforced. (*Sheffield v. Coventry*, *Earl of*, (Chancery), 2 Russ. & M. 317).

(c) BREACH OF.

SKINNERS' COMPANY v. JONES, H. T. 1837. C. P. 3 *Bing. N. S.* 481; S. C. 4 *Scott*, 271.

A bond is forfeited by the non-payment of interest at the time named, and the acceptance of interest does not waive the forfeiture.

IN an action on a bond, it appeared that the defendant, with one H., entered into a joint and several bond, with a penalty conditioned for repayment by H. of a sum of money lent at the end of three years, and for payment of interest on the 1st of March in each year. In 1833 the interest was not paid until the 30th March; after which the defendant became a bankrupt and obtained his certificate.

The Court held, that the certificate was a bar to an action against the defendant for a subsequent default by H. in not paying the principal, as the bond was forfeited by the non-payment of interest on the appointed day, before the bankruptcy, and the forfeiture could not be purged by the subsequent payment; consequently, the penalty became the debt in law, and was provable under the commission.

(d) WHEN UNDER A STATUTE.

COLLINS v. GWYNNE, E. T. 1831. C. P. 7 *Bing.* 423; S. C. 5 *M. & P.* 276.

Where a particular form of a bond is prescribed by statute, a slight deviation may be regarded as surplusage.

THE condition of a bond given by a collector of taxes contained also a distinct clause for accounting and paying over to the commissioners, which was not authorized by the 43 Geo. 3, c. 99, under which the bond was given. In an action on the bond it was contended, that the bond was vitiated, not being in conformity with the statute.

Sed per Cur.—There is no provision in the act that the bond shall be taken in one particular form, and the condition to pay to the commissioners does not render the whole bond void. In *Newman v. Newman*, (4 M. & Selw. 66), Lord Ellenborough said: "Admitting the condition of the bond to be ill as to one part of it, it seems that it may be well as to the other parts; for you may separate, at the common law, the bad from the good."

LOVELAND v. KNIGHT, H. T. 1828. K. B. 1 *M. & Ry.* 597.

Hence, a misrecital in the condition of a bond of a statute, as "on" instead of "of," is immaterial.

DEBT upon a bond executed by the defendant, as the surety of A. B., a collector of assessed taxes, for the due payment over by the latter of the taxes collected by him. Plea, non est factum. The only question was, whether the title of the act of Parliament authorizing the collection of the taxes in question was correctly recited on the record, in which the condition of the bond was set out on oyer: the condition, as it appeared upon oyer, stating that the act was one respecting "duties on assessed taxes;" whereas, according to the condition of the bond when produced in evidence under the issue of non est factum, the title of the act was, "duties of assessed taxes." It was objected, that this was a fatal variance; but Lord Tenterden, C. J., overruled the objection, and the plaintiff had a verdict.

And the Court refused to interfere.

VIII. RELATIVE TO THE ALTERATION OF.

ADAMS *v.* BATESON, T. T. 1829. C. P. 3 M. & P. 339; S. C. 6 Bing. 110.

IN debt on a joint and several bond, the condition set out was for payment by the defendant and A. and R. The bond being given in evidence, it was found to have been altered, one H. being substituted for R. in the condition.

Per Cur.—Two points have been raised on the part of the defendant: first, that the bond was avoided by the alteration made therein; secondly, that there was a material variance between the condition set out in the declaration and that which appeared on the bond being given in evidence. The opinion we have formed on the second point renders it unnecessary to consider the first. We think the variance fatal. The bond produced was not a bond conditioned for payment by three persons named in the declaration, but by three persons, one of whom is not named in the declaration.

Alteration by substituting one surety for another after execution by a co-surety, without his assent, avoids the bond*.

IX. RELATIVE TO THE DISCHARGE OF OBLIGOR.

BESWICK *v.* SWINDELLS, H. T. 1834. K. B. 3 N. & M. 159; S. C. 3 Ad. & E. 866.

UPON the marriage of the defendant with the widow of C. then carrying on trade, he gave a bond conditioned to pay a certain sum to the children of C. on her death, if, upon an account taken, the stock &c. of the trade, if then carried on by him, should amount to £—; and if less, a proportionate sum. The defendant having put an end to the trade altogether—

Per Cur.—A plea, that the obligor had, before his wife's death, ceased to carry on the business, is a good bar to an action on the bond. We do no injustice, nor violate any rule of law, in saying that the defendant is not liable, because the event has not happened on which alone he was to pay the sum; viz. the carrying on the business at the time of his wife's death.

Where the obligor gives a bond conditioned that, if a certain thing be done by him, he shall pay &c.:—Held, that, if not done, the bond was discharged.

X. RELATIVE TO THE ASSIGNMENT OF.

DANGERFIELD *v.* THOMAS, M. T. 1838. Q. B. 1 P. & D. 287.

IN debt on bond; plea, averring the bankruptcy of the plaintiff and appointment of assignees, who, by reason of the premises, became entitled to the bond debt; replication, that the plaintiff had, by indenture, assigned the bond as a further security for a debt, with

To a plea, that the bond vested in the assignees of the plaintiff,

* If the bond be altered by the obligee, although but in an immaterial point, he vacates the deed; (See 10 Co. 92; 11 Co. 27, a; Bull. N. P. 267); though an alteration by a stranger, in an immaterial point, will not avoid the instrument: but it is said to be otherwise if a stranger alter it in an essential particular; for the witnesses cannot prove it to be the deed of the party where there is any material variation; (11 Co. 27; Bull. N. P. 267; Com. Dig., tit. *Fait*, 1; Roll. 41; Cro. Eliz. 626); as where the date is erased after the delivery. (5 Co. 23).

a bankrupt, the defendant may reply, it was assigned to him as a security for a debt, and that the action was for his benefit.

a proviso for redemption; and that the action was brought for the benefit of such creditor. On special demurrer—

The Court held the replication good, the bond being of less amount than the balance due on the debt, for the security of which it had been assigned, and so no benefit to arise to the bankrupt's estate, and no other available security: the transfer of the plaintiff's interest in the bond, although only stated to be a further security, was complete.

XI. RELATIVE TO THE OBLIGEE'S REMEDY AGAINST THE OBLIGOR.

(a) ACTION ON; WHEN MAINTAINABLE.

HILL v. MANCHESTER AND SALFORD WATERWORKS COMPANY,
T. T. 1832. K. B. 2 B. & Ad. 544.

A bond given by a company under a statute, that the holder of the bonds shall have a "lien on the rates," "the same as if advanced upon mortgage," &c., is an additional security, and does not preclude the holder from suing on the bond.

IN debt on bond given by a company empowered to raise monies for certain purposes, and reciting that it was given for sums borrowed and advanced conformably to the act. Plea, that it was made and executed by the company with the intent of borrowing 100*l.* thereon for the purposes specified in the act 53 Geo. 3, c. 20, pursuant to the provisions in that act as to raising money on bond; that the said 100*l.* was borrowed by the company of the plaintiffs on the security of the said bond; and that the same was delivered to secure the sum and interest as in the condition mentioned; and that the plaintiff thereupon became, and still was, entitled to all the privileges and benefits of a claim or lien *on the rates* and sums of money in the last-mentioned act referred to. It also stated that divers sums of money had, in like manner, been borrowed by the company from other persons on bond, pursuant to, and for the purposes of, the last-mentioned act; which bonds were still unsatisfied, and which persons were also entitled to a lien on the said rates and sums in the act mentioned; and that mortgages also had been executed by the company on their undertaking to a large amount, pursuant to the last-mentioned statute; and that the sums borrowed on such mortgages were still due. The plaintiff specially demurred to the plea.

Per Cur.—The company were empowered, by the 10th section of the same act, to raise money by bonds or promissory notes, as stated in the condition of the bond declared on. The provision with respect to these was as follows: "And the rates and sums of money authorized to be taken, and which shall arise and be taken by virtue of this act, shall be security for any sum or sums of money so to be borrowed as last aforesaid, with interest, to the person or persons who shall from time to time be entitled to such securities and the principal money and interest thereby secured; and all persons to whom any such securities as aforesaid shall be given, shall be equally entitled to a claim or lien on the said rates and sums of money in proportion to the respective sums mentioned thereby to be secured and advanced, *as if the same were advanced upon mortgages* or assignments of the said estates, or in the purchase of annuities, in pursuance or by virtue of this act, *and without any preference by reason of the priority of date* of any such securities, or on any other account whatsoever." It is true, that section gives a lien to holders

of bonds; but still the bond is a security of itself, and may so be enforced. The lien is an additional security.

GIBBS v. SOUTHAM, H. T. 1834. K. B. 3 N. & M. 155; S. C. 5 B. & Ad. 511.

THE condition of the bond was, "That, if the defendant, his heirs, &c., shall well and truly pay unto Elizabeth Edwards, her executors, &c., the full sum of 756*l.*, with interest for the same after the rate of 5*l.* for each hundred pounds for a year, without fraud or delay, then this obligation to be void. Plea, that the said Elizabeth Edwards, in her lifetime, did not, nor have or hath the plaintiffs, or either of them, since the death of the said Elizabeth, after the making of the writing obligatory, and before the exhibiting the bill of the plaintiffs against the defendant, demanded payment of the 756*l.*, with interest after the rate aforesaid. General demurrer.

No demand is requisite where the bond is payable for a certain sum and interest.

Per Cur.—We entirely concur with the decision in the case of *Carter v. Ring*, (3 Camp. Rep. 459), that, where the condition of the bond is to pay a certain sum *on demand*, and issue is taken on the demand, an actual demand is necessary. In this case the condition of the bond does not make the money payable on demand. It would have been a very different case if it had. The rule laid down in Comyns' Digest, *Condition* (G. 5), vol. ii, p. 450, is this:—"Where a condition is to do a transitory thing, without limiting any time, it ought to be done immediately, viz. in *convenient* time, as an obligation to pay money, to deliver charters," &c. &c. The same rule is laid down in Coke upon Littleton. (Co. Litt. 208, b). We think no demand necessary in this case.

(b) FORM OF ACTION*.

(c) PARTIES TO THE ACTION†.

* Debt is the proper form of action by which the payment of a bond can be enforced. (See Comb. 447; Com. Dig., tit. *Debt*, a. 4).

† *By whom to be brought.*—The action upon a bond must be instituted in the name of the party in whom the *legal interest is vested*, viz. the obligee or party to whom the obligor has bound himself: thus, if a bond be made to A., to pay him or a third person a sum of money for the benefit of the latter, the action must be in the name of A., and the third person cannot sue or be joined. When the obligation is to pay several, they must all, if living, join in the action, even if the instrument was in terms joint and several. If one or more of several obligees, who ought, when living, to join, be dead, or did not seal the instrument, that fact should be averred in the declaration at the suit of the others, or the defendant may craveoyer and demur; but, if the plaintiff be prepared to prove the death of the party whose name is not inserted, the omission of the death in the declaration would be no ground of nonsuit. (5 Esp. 32). And if it appear upon the face of the pleadings that there are other obligees who ought to be, but are not, joined in the action, it is fatal on demurrer, or on a motion in arrest of judgment, or on a writ of error; and though the objection may not appear on the face of the pleadings, the defendant may avail himself of it, either by plea in abatement, or as a ground of nonsuit on the trial. When the bond has been assigned, the action must be brought in the name of the original obligee. Where one or more of several obligees die, the survivor and not the executors or administrators of the deceased, must sue, nor can the latter be joined in the action; but where there is only one obligee, and he die, the action must be by the executor or administrator.

(d) ARREST OF OBLIGOR AND AFFIDAVIT OF DEBT*.

(e) DECLARATION.

ADAMS v. BATESON, T. T. 1829. C. P. 6 Bing. 110; S. C. 3 M. & P. 339.

A declaration, stating a bond conditioned to pay by A., B. and C., is not supported, if A. and B. and D. be named, and not C.

In debt on a joint and several bond, the condition set out was for payment by the defendant and B. and C. The bond being given in evidence, it was found to have been altered, one D. being substituted for C. in the condition. The defendant pleaded non est factum.

Per Cur.—Two points have been raised on the part of the defendant: first, that the bond was avoided by the alteration made therein; secondly, that there was a material variance between the condition set out in the declaration and that which appeared on the bond being given in evidence. The opinion we have formed on the second point renders it unnecessary to consider the first. We think the variance fatal. The bond produced was not a bond conditioned for payment by the three persons named in the declaration, but by three persons, one of whom is not named in the declaration.

(f) PLEAS.

1. General Issue†.

WILLIAMS v. BRYANT, T. T. 1839. 7 D. P. C. 502.

Under the plea of non est factum, the defendant cannot object, that the bond was entered into in one christian name, and the declaration states two.

To a declaration in debt on bond, describing the defendant as W. F. B., sued by the name of W. B., the defendant pleaded non est factum. It appeared, that the bond was executed in the name of W. B., by which name, at the time of its execution, the defendant was known.

Per Cur.—It is a settled point, that, if a declaration against a defendant by one christian name, as for instance, Joseph, state that he executed a bond by the name of Thomas, and there be no averment to explain the difference, such as that he was known by the latter name at the time of the execution, such a declaration would be bad on demurrer, or in arrest of judgment, even after issue joined on a plea of non est factum. And the reason appears to be, that, in bonds and deeds, the efficacy of which depends on the instrument itself, and not on matter in pais, as feoffments, there must be a certain designatio personæ of the party, which regularly, in the

Against whom to be brought.—The action must, in general, be brought against the obligor or his executors or administrators; or, if the heir be named, and he have assets by descent, against the heir; or, if there be several, and the obligation only joint, against them all; or if joint and several, against them all jointly, or each separately; or if one of the obligors in a joint bond die, the survivor alone must be sued; for if the executor or administrator be sued, he may either plead the survivorship in bar or give it in evidence under the general issue; but if it were several, or joint and several, the executor of the deceased may be sued in a separate action, but he cannot be made a defendant jointly without the survivor, because one is to be charged de bonis testatoris, and the other de bonis propriis.

See ante, tit. *Affidavit to hold to Bail—Arrest.*

† The plea of non est factum, or general issue, puts in issue the execution of the bond upon which the action is brought.

case of ordinary persons, ought to be the true first name, or name of baptism, and surname, (Shep. Touch. 233), of which the first is the most important; and there are many cases in which the Court have said, and as recently as that in Willes, 534, that a man cannot have two christian names at the same time, nor can he, properly and strictly, have two; but, on the other hand, it is certain that a person may, at this time, sue or be sued, not merely by his true name of baptism, but by any first name which he has acquired by usage or reputation, though it was otherwise held in the case in Vin. Abr., *Misnomer*, (C.) 12, in 7 Will. 3. If a party is called and known by any proper name, by that name he may be sued, and the misnomer could not be pleaded in abatement; and not only is this the established practice, but the doctrine is promulgated in very ancient times, in Bracton, 188, b. On a plea of non est factum, where the difference of name does not appear on the record, and there is evidence of the party having been known, at the time of the execution, by the name on the instrument, there is no case cited on the argument, and none that we are aware of which decides that the instrument is void. In *Hyckman v. Shotbolt*, (4 Dyer, 279), which was cited as shewing that the variance of the name was fatal on non est factum, the wrong name in the bond (John instead of William) is said to have been inscribed by *mistake*, and, therefore, it is to be presumed was not a name by which he was known. In the absence, therefore, of any authority to the contrary, and relying upon the law now fully established as to misnomers in actions, we think a bond is not void which is in the name (whether such name be the first, or christian name, or family name) by which the party is commonly called or known; and, consequently, that the plaintiff in this case was entitled to recover. We wish to add, that it appears to us, that, if the objection were valid, it would not be available under this plea of non est factum, since the new Rules.—Rule discharged.

EDWARDS v. BROWN, H. T. 1831. Ex. 1 C. & J. 307; S. C. 1 Tyrw. 182.

PLEA, non est factum, to debt on bond by A. and B. and C. as sureties, reciting, that A. was seised in tail of mortgaged premises; that, by indentures of lease and release, the same had been conveyed to make a tenant to the præcipe that a recovery might be suffered; and the condition was for the suffering a recovery in such manner, that, under and by virtue thereof, and of the release, the premises should be vested in the obligee in fee, according to the true intent and meaning of the release—

The Court held, that, upon the plea of non est factum, the defendant could not prove that he was drawn in by fraud to execute the deed, and that such evidence could not be received.

HARMER v. ROWE, T. T. 1818. K. B. 6 M. & S. 146.

DEBT on bond. Plea, non est factum. The defence was, the consideration was illegal, it arising out of embezzlement.

The Court held, that fact could not be shewn under the plea of non est factum; it should have been specially pleaded,

Under the plea of non est factum defendant cannot shew he was induced to execute the bond by fraud,

or the consideration was for embezzlement.

DUVERGIER *v.* FELLOWES, E. T. 1830, in error. 10 *B. & C.* 826; S. C. 2 *M. & P.* 411; S. C. *Cl. & Fin.* 39.

If the declaration does not state the condition, the plea may aver its illegality.

DEBT on bond for 10,000*l.* The defendant cravedoyer of the bond and condition, which was for payment of 10,000*l.* to the plaintiff in the event of his procuring subscribers for 9,000 shares in a company to be formed for becoming assignees of two patents in which the defendant was interested, and for carrying on the patent process; and then pleaded, that the patents contained a proviso, that they should be void if they were assigned to or in trust for more than five persons. Demurrer and joinder.

Per Cur.—The plea avers that the thing was to be done under pretence of carrying on the exclusive process, and shews the consideration to be illegal.

2. *Accord and Satisfaction.*

FIELD *v.* ROBINS, E. T. 1838. Q. B. 3 *N. & P.* 226.

If one of two obligees be sued and pays a sum in discharge of the debt and costs, and the other being sued pleads the acceptance as an accord and satisfaction, he must prove it was a settlement of the cause of action.

THE obligee of a joint and several indemnity bond sued in separate actions the two obligors. He had sustained a loss exceeding 1000*l.* The one action he settled on the payment of 215*l.*, and gave a receipt for that sum as accepted in discharge of the damages and costs in that action. The other defendant pleaded, that, while the damages were yet unliquidated, James Robins paid to the plaintiffs, and the plaintiffs received the sum of 215*l.* in full satisfaction of the said damages sustained by them by reason of the breaches of the bond. This was traversed by the plaintiffs. The plaintiffs having proved that they had sustained a loss amounting to 1098*l.* 14*s.* 11*d.*, the defendant produced this receipt in support of his plea, which had been given in an action brought by the plaintiffs against James Robins, the co-obligor of the bond, for the same cause of action. It was contended, that this receipt was a discharge to the present defendant, having been given in satisfaction of the same cause of action.

Per Cur.—The onus of proving that the money was paid to and accepted by the plaintiffs in full satisfaction of their damages was thrown upon the defendant. He did not prove it; indeed, it is not very likely that his plea was true, as the plaintiffs claim 1098*l.*, and the sum of 215*l.* only has been paid.

3. *Apprenticeship; Bond given to ante-date.*

POOLE *v.* WIGGINS, M. T. 1836. C. P. 3 *Bing. N. S.* 230; S. C. 3 *Scott*, 601.

A plea, that a bond was given in consideration of ante-dating a deed of apprenticeship, contrary to the 55 Geo. 3, c. 19, is good after verdict.

PLEA to debt on bond, that it was given on a corrupt agreement for articles of apprenticeship to the plaintiff, as an apothecary and surgeon, for two years, but that the deed should be ante-dated, to enable the defendant to be admitted as an apothecary at the end of two instead of five years, contrary to the 55 Geo. 3, c. 19, s. 15. After a verdict for the defendant—

The Court refused judgment for the plaintiff, non obstante verdicto, observing, the costs must be paid under the 3 & 4 Will. 4,

c. 42, s. 31, as the affidavit on which the motion was made did not negative on the part of the plaintiff's all knowledge of the fraud, and more especially when the plea put upon the record contained distinct allegations of such fact.

4. *Bankrupt; that Plaintiff is a Bankrupt.*

DANGERFIELD *v.* THOMAS, M. T. 1837. Q. B. 1 P. & D. 287.

IN debt on bond, plea, averring the bankruptcy of the plaintiff, and appointment of assignees, who, by reason of the premises, became entitled to the bond debt. Replication, that the plaintiff had by indenture assigned the bond as a further security for a debt with a proviso for redemption, and that the action was brought for the benefit of such creditor. On special demurrer—

The Court held, that the replication was good without making profert of the assignment.

Debt on bond. Plea, plaintiff's bankruptcy. Replication, that the bond was assigned by deed to secure a debt:—Held, that profert need not be made of the assignment.

5. *Composition; Bond given to sign Deed of.*

TUCK *v.* TOOKE, E. T. 1829. K. B. 4 M. & Ry. 393; S. C. 9 B. & C. 437.

A COMMISSION was superseded under sect. 133 of 6 Geo. 4, c. 16, but the plaintiff, a creditor, was not present at the meetings, and neither acceded to the composition, nor had proved his debt; it appeared also, that the defendant afterwards paid the plaintiff the amount of the composition on his debt, and gave a bond for the residue. The plea alleged only the giving of the bond after the agreement with the creditors for the composition, and the payment of the composition.

The Court held the plea bad, not shewing that it was any part of the agreement, that the bond should be given, or that it was given under any pressure, or that fraud had been practised; and, therefore, the plaintiff was entitled to judgment non obstante veredicto, and although fraud and covin were found by the jury.

To an action on a bond, plea, that the plaintiff received a composition as to part of his debt, and the bond for the residue not shewing it was part of the agreement that the bond should be given, the plaintiff is entitled to judgment non obstante veredicto.

6. *Fraud*.* See, ante, Div. *General Issue.*

7. *Payment.*

BISHTON *v.* EVANS, E. T. 1835. Ex. 2 C., M. & R. 12; S. C. 3 D. P. C. 735.

To a declaration on a bond, for payment of a sum with interest; breach, the non-payment of the principal sums, (omitting as to the interest); plea, that the defendant paid the principal *with interest*, &c. Upon special demurrer—

Where the declaration is for non-payment of principal, a plea of payment of

* Where it once is shewn that the party executing the deed is aware of its contents, evidence that the party was induced to execute it by previous fraudulent misrepresentations:—Held inadmissible, under a plea that it was obtained by fraud and covin. (*Mason v. Ditchbourne*, H. T. 1835, N. P., 1 M. & Rob. 460).

principal and interest is bad on demurrer.*

Per Cur.—The plea ought to contain an issue taken upon some averment in the pleadings on the other side, and such issue ought not to include any other matter. That being the principle upon which the plea ought to have been constructed, what is the present plea? It includes a fact of which no averment is to be found in the declaration. It states that the defendants paid to the plaintiffs the sum of £——, with interest for the same; thus averring a payment both of principal and *interest*, a fact to which no corresponding averment is to be found in the declaration. The issue, therefore, is improperly offered, and the plea is bad.

ASHBEE v. PIDDUCK, T. T. 1836. Ex. 1 M. & W. 364; S. C. 1 T. & G. 1016.

Plea as to part, payment, and as to residue, a release of a deceased co-obligor:—Held, a bad plea—1st, because payment of part after forfeiture is no answer; and, 2ndly, because the plea did not shew defendant was surety.

THE defendant, Pidduck, cravedoyer of the bond and condition, which were set out; (by the condition, it appeared, that the bond was given by Hannah Harrison, Isaac Pidduck, and Thomas Leame, to secure 1400*l.* with interest); and pleaded, as to 800*l.*, that, after the death of H. H. and John Ashbee, the defendants paid to the plaintiff, as administratrix, the said sum of 800*l.*, parcel of the said sum of 1400*l.*, together with all interest due on the whole of that sum; and as to the 600*l.*, residue of the said sum of 1400*l.*, action non, because the defendants made the bond, at the request of the said Hannah Harrison, and as her sureties, to the said John Ashbee, and that afterwards she died, having made her will, and appointed one Robert Harrison her executor. The defendant then set out a deed of composition between the said Robert Harrison and his creditors, whereby he gave up all his property to trustees to pay a dividend to such of his creditors as should sign the deed in satisfaction of their debts, who agreed thereby to release the said R. H. from all further claim, and that the plaintiff being one of the creditors of the said R. H. in respect of the said 600*l.*, signed and sealed the deed, and agreed to partake of such dividend, and in such indenture was mentioned. The plaintiffs demurred—

The Court held, first, that, the penal sum being forfeited, and the payment only as to part of the sum mentioned in the condition, the plea was bad; secondly, that nothing appearing to shew the defendants to be only sureties, the release was no discharge of the surviving obligor.

S. Rates; by Collector of, and by Collector of Dust.†

WEBB v. JAMES, H. T. 1841. Ex. 9 D. P. C. 314; S. C. 7 M. & W. 279.

Bond for the due collection

To debt on bond given as a security for the due performance of the office of collector of rates, and conditioned for payment of all

* In debt on bond, the only plea being solvit ad diem, the execution of the bond is admitted, and the defendant begins. (*Sandford v. Hunt*, 1823, N. P., 1 C. & P. 118).

† Where, upon a bond conditioned for payment of an annual sum to trustees, in consideration of being allowed the exclusive privilege of collecting cinders, &c., of the parish, it appeared that, by an act passed subsequently, a part of the parish was separated for similar purposes, whereby the defendant was prevented from obtaining the cinders in that part:—Held, that a plea, that the trustees did

monies received, "by virtue and for the purposes of a certain act of Parliament, and relative to the collectorship of such rates." The defendant pleaded, that "no rate was made, or in any way existed, which he could legally and according to law collect, or get in, or could legally, or according to law, demand or obtain by virtue of his said office; and that he did not, during the continuance of his appointment, legally receive any money by virtue or for the purposes of the said act, or relative to the collectorship of the said rates. Special demurrer on the grounds: first, that, if the defendant, James, had received money by virtue and for the purposes of the act, and relative to the collectorship, he is not excused from accounting for it and paying it over, by reason of any illegality connected with the receipt of it; secondly, that the plea was a negative pregnant, and that it was ambiguous whether it meant to put in issue the receipt of the rates, or that he received them, but that such receipt was illegal; and thirdly, that the plea tendered an issue upon matter of law in the illegal receipt of money, and the plaintiff could not take a certain or material issue thereon.

of rates. Plea, that the rate could not be legally demanded, is a good plea unless demurred to.

The Court held, that the former part of the plea would have been held bad on special demurrer, as a negative pregnant, for not shewing in what way the rate was illegal; but those objections not having been raised, the latter averment afforded a substantial answer to the action.

9. *Release.* See ante, Div. *Payment*, p. 415.

10. *Set-off.*

PENNY v. FOY, E. T. 1828. K. B. 8 B. & C. 11; S. C. 2 M. & Ry. 181.

To debt on bond, the defendant pleaded (inter alia) by way of set-off a bond given to him by the plaintiff, conditioned for payment of an annuity granted by the defendant to a third party, and for indemnifying the defendant therefrom.

The Court said.—The case of *Toussaint and Others v. Martinnant*, (2 Term Rep. 100), shews, that where there is an indemnity bond, the surety must shew that he is damnified, because when he is the bond becomes forfeited. But here the party engaged to pay the annuity, and the indemnity is only another of the conditions. He did not pay the annuity, and therefore the bond became forfeited. The defendant was entitled to have the annuity paid, and he has no remedy but upon this bond, which he had a right to put in suit, upon default being made in payment of the annuity.

To an action on a bond, the defendant pleaded set-off of a bond by the plaintiff to the defendant:—Held, that the plaintiff was bound to prove performance of his bond to avoid the effect of the plea.

11. *Statute; Bond not in conformity with.*

HILL v. MANCHESTER & SALFORD WATER WORKS COMPANY, M. T. 1833. K. B. 5 B. & Ad. 866; S. C. 2 N. & M. 573.

A COMPANY, established by local act of Parliament, had the power to borrow money upon bond for certain purposes in advancement of the object of the act. Being sued upon a bond they had

To a declaration on a bond, stating, that it was given for mo-

not allow or permit the defendant to collect, &c., was not an answer; and *semble*, he could not plead, by analogy to a tenant, that he had been evicted, or any defence at law, as an answer to the action. (*Townson v. Green*, 1825, N. P., 2 C. & P. 110).

ney advanced conformably to a statute. Plea, it was not borrowed for the purposes of the statute, is bad.

given, appearing on the face of it to be given for those purposes, they pleaded that the bond was not given for those purposes.

The Court held that the plea, not shewing that the consideration was illegal or inconsistent with the acts, or a want of consideration, but generally that the bonds were only colourably executed, and the money not borrowed or lent for the purposes of the act, was bad.

(g) EVIDENCE *.

SANDERS v. MEREDITH, M. T. 1828. K. B. 3 M. & Ry. 116.

The presumption of payment is rebutted by an indorsement of interest on the bond within twenty years.

DEBT on bond, dated 2nd June, 1804. The defendants pleaded, first, non est factum; and, secondly, payment by John Woofe before action brought. The plaintiff produced and proved the bond, on which was indorsed the following receipt and memorandum:—
“Exeter, August 13th, 1808. Received of the within-named John Woofe 30*l.* for three years’ interest on the within named, due the 2nd day of June, 1807.”

“DANIEL SAUNDERS.”

Per Cur.—This bond is more than twenty years old, which circumstance raises a presumption of payment. The question is, whether there has not been a clear acknowledgment within twenty years. The simple payment of interest which has accrued within twenty years, is a clear acknowledgment that the bond was unsatisfied. Payment within twenty years of interest which has accrued beyond the twenty years, is only proof that such a bond once existed. But the making of the indorsement on the bond itself, in 1808, is an admission that the debt was a valid subsisting debt within twenty years.

GLEADOW v. ATKIN, H. T. 1833. EX. 1 C. & M. 410; S. C. 2 C. & J. 548.

And the presumption of payment, after twenty years, may be rebutted, if payments have been made equal in amount to the interest which would become due on the bond†.

DEBT on bond. Plea, payment. It appeared that one Cuthbert Thew, who died in the year 1800, had made a will, whereby he bequeathed certain personal property to Robert Gleadow and John Atkin, and the survivor of them, in trust to sell and dispose of the same; and when converted into money, to place the proceeds out at interest on such real or other sufficient security as they should approve of, and to pay the interest to his wife during her life, and after her decease to pay the principal monies in discharge of certain legacies; it being declared that each of the trustees should be only answerable for his own acts. Robert Gleadow and John Atkin were also appointed executors, and took out probate, and received the sum of

* The plaintiff, in support of his case (if non est factum be pleaded) will have to prove by the testimony of a subscribing witness, (if any), the execution of the instrument by the defendant, and the sealing and delivery. It will not be sufficient for the witness to prove, that a person of the same name as defendant executed the deed; since proof will be necessary to shew, that the person who executed the deed bears not merely the defendant’s name, but is the defendant himself. (See Bull, N. P. 171; Phill. on Ev., Vol. I, 143).

† In debt on an annuity bond:—Held, that payment of interest, after a considerable time, was evidence for the jury to presume payment of the consideration, although the attesting witness could not speak to the fact, and no receipt was indorsed. (*Haslam v. Diggles*, 1 Carr. N. P. 398; and see *Poole v. Cabanes*, 8 T. R. 328; and *Ex parte Maxwell*, 2 East, 85).

The stat. 3 & 4, Will. 4, c. 42, s. 3, expressly enacts, “That all actions of

280*l.* under the will. Atkin wishing to make use of this money, on the 17th September, 1805, gave Gleadow the bond, on which the action was brought. Gleadow died in 1826, Atkin in 1827, and Mrs. Thew, the widow of the testator, was living at the time of the trial. To rebut the presumption of payment arising from the age of the bond, a witness named Stone was called, who stated, that, in 1826, shortly before the death of Atkin, he applied to him on the part of Mrs. Thew for payment of interest due on a bond, and that he was afterwards present at the payment by Atkin to her on that account of a sum of money; which sum, it appeared, was equal in amount to what would be payable in respect of interest on the bond. To apply this payment to the bond in question, the plaintiff offered to read in evidence the following indorsement thereon:—

“I, the within-named Robert Gleadow, do hereby acknowledge, that the within-mentioned principal of 250*l.* is not my own proper money, but trust money under the will of the late Cuthbert Thew, to be placed out by myself and the within-named John Atkin. As witness my hand, this 17th of September, 1805.”

“ROBERT GLEADOW.”

“Witness, WILLIAM PYBUS.”

This indorsement and the bond appeared to be in different inks, and the dates of them both, which were the same, were written by Jackson. It did not appear that the obligor had ever seen this indorsement; and Pybus, on proving his signature as attesting witness to the indorsement, said “that he had no recollection when or where it was signed, but that he should not have put his name to it, had he not seen it signed by Gleadow when it was dated.” It was objected for the defendant, that the indorsement was not admissible in evidence, but *Parke, J.*, overruled the objection; reserving leave to the defendant to move to enter a nonsuit.

On motion for that purpose the Court refused to interfere.

(*h*) STAYING PROCEEDINGS*. See, also, p. 421.

covenant or debt, upon any bond or other specially, shall be brought within twenty years after the cause of such actions or suits, but not afterwards.”

Where the bond was given for money lent to enable the obligor to go abroad, where he shortly died, and there was no evidence that his administrator had ever received any assets:—Held, that the presumption of payment for twenty years was rebutted by the circumstances. (*Tenterden, C. J.*—*Elliott v. Elliott*, H. T. 1831, N. P., 2 M. & Rob. 44).

* Before the 4 Ann. in an action on a bond conditioned for the payment of money only, the Courts would relieve from the penalty, on payment of the principal, interest, and costs; (*Ireland's case*, H. T. 1703, K. B., 6 Mod. 101; S. P. *Le Sage v. Pere*, M. T. 1702, K. B., 7 Mod. 114); and, upon bringing the penalty into Court. (*Gregg's case*, E. T. 1705, K. B., 2 Salk. 597; S. P. *Anon.*, M. T. 1703, K. B., 6 Mod. 11). But now the penalty need not be brought into Court, by the 4 & 5 Ann. c. 16. And the Court will direct the Master to compute interest, as well as principal and costs, though no day of payment is named, and though interest be not reserved. (*Farquhar v. Morris*, H. T. 1797, K. B., 7 T. R. 124).

A bond was conditioned to pay 165*l.*, by certain instalments, until the whole should be paid; but, if default was made in paying any one, the obligation was to remain in force. An action having been brought upon the bond, in consequence of a default in payment of the second instalment, a Judge ordered, that, on payment of the 15*l.* and costs, proceedings should be stayed:—Held, that the Judge had no power to make such order. (*Nayler v. Mopsey*, H. T. 1836. Ex. 4 Dowl. P. C. 669).

(i) SUM RECOVERABLE*.

(j) VERDICT, JUDGMENT, AND EXECUTION†.

XII. RELATIVE TO THE OBLIGEE'S REMEDY AGAINST THE HEIR OR DEVISEE OF OBLIGOR†.

XIII. RELATIVE TO THE REMEDY ON A BOND IN CASE OF BANKRUPTCY. See ante, tit. *Bankrupt*.

* On the forfeiture of a bond, the whole penalty was formerly recoverable at law, but the courts of equity interposed, and would not permit a man to take more than *in conscience* he ought; viz. his principal, interest, and expenses, in case the forfeiture accrued by non-payment of money borrowed, and the like. And a similar practice having gained some ground in the Courts of law, the statute of 4 & 5 Anne, c. 16, enacted, that in case of a bond conditioned for the payment of money, the payment or tender of the principal sum due with interest and costs, even though the bond be forfeited and a suit commenced thereon, shall be a full satisfaction and discharge. In general, there can be no remedy at law beyond the penalty; for a man can have no more than his debt, and the penalty is the utmost of his debt. (See 6 T. R. 303; 2 Marsh. 226). But see *M'Cluse v. Dunkin*, (1 East, 136), in which it was determined that, in an action on a judgment recovered on a bond, interest might be recovered in damages beyond the penalty; though Lord Kenyon, C. J., admitted, that, if the action had been on the bond, it would have been otherwise; (see 2 T. R. 388; 6 East, 564; 10 Ves. 409); yet, in *Francis v. Wilson*, (1 R. & M. 105), where the penalty was for the same sum as the amount secured, it was holden, that interest was recoverable, though it exceeded the amount of the penalty. And where the obligee is plaintiff, equity, in general, will not carry the debt beyond the penalty, he having made himself the judge of his recompense. (See 1 Vern. 360; 1 Salk. 154; 2 Vern. 509; 2 Bro. P. C. 489; 1 Atk. 175; 3 Bro. C. C. 489; Id. 496; Dick. 305; Dick. 408; Dick. 514; 2 Anstr. 525; 3 Ves. 557; 4 Ves. 329). But it is otherwise where the obligee is defendant; for then the maxim applies, that he who will have equity must do equity; (1 Eq. Abr. 92, pl. 7); and equity will, under special circumstances, carry a debt beyond the penalty, as where a man is kept out of his money by an injunction, or is prevented from going on at law; (see Show. P. C. 15); or where an advantage is made of money; (see 2 Bro. P. C. 251); or where a bond is only taken as a collateral security; (3 Bro. P. C. 333); or where the recovery of the debt is delayed by the obligor; (see 6 Ves. 192); or there are some other special circumstances. (See 6 Ves. 416).

Where the conduct of the obligee had been extremely vexatious in a clear case of account, and by which legal remedies had been stayed, the Court decreed payment of the principal and interest up to the time of the report, although exceeding the penalty of the bond. (*Grant v. Grant*, (Chancery), 3 Sim. 340).

So, where a party has been restrained from proceeding at law whilst the debt was under the penalty:—Held, that he has a right, in a court of equity, to principal and interest, beyond the penalty of the bond. (*Grant v. Grant*, (Chancery), 3 Russ. 607).

† In an action on a bond for payment of the same sum as the penalty, with interest:—Held, that the jury might give interest, by way of damages, beyond the penalty, for the detention of the debt. (*Francis v. Wilson*, 1 R. & M. N. P. 105). Judgment is usually entered up for the whole penalty specified in the bond, and remains as a security; but execution will be stayed upon payment of the sum really due. (See 2 Burr. 825).

† An action will lie against an heir having assets by descent in fee-simple, on the obligation of his ancestor wherein the heir is expressly bound. (See 1 Inst. 209, a; 2 Saund. 136; 1 Ves. 212). The law considers the bond of the ancestor, wherein the heir is bound, as becoming, upon the death of the ancestor, the heir's own debt, in respect of the assets which the heir has in his own right, and holds him liable upon such bond to the value of the land descended. (See Gilb. Deb., b. 2, c. 1).

XIV. RELATIVE TO THE REMEDY ON A BOND IN CASE OF INSOLVENCY. See post, tit. *Insolvent Debtor*.

XV. RELATIVE TO SURETY'S REMEDY AGAINST HIS PRINCIPAL*.

XVI. RELATIVE TO PROCEEDINGS UNDER THE 8 & 9 WILL. 3. See also, post, tit. *Covenant*.

JAMES v. THOMAS, M. T. 1833. K. B. 5 B. & Ad. 40; S. C. 2 N. & M. 663.

A BOND, for a penal sum of 560*l.*, was conditioned for the payment of 280*l.* in three years, with interest in the mean time half-yearly. It was provided, that in case of default in payment of the interest, the creditor should be at liberty to call in and demand payment of the principal. Default being made in payment of the interest, and an action brought for the whole—

The Court held, that the defendant was not entitled to a stay of proceedings under 8 & 9 Will. 3, c. 11, on payment of the interest and costs; the principal having become a debt payable, and not a penalty.

See sections of act in judgment of Court, *infra*.

SMITH v. BOND, T. T. 1833. C. P. 10 B. 125; S. C. 3 M. & Scott, 528.

To an action of debt on bond, the plea set out the condition which was for payment of a sum of 5000*l.* on a given day, and interest, pursuant to the stipulations in a certain indenture, and alleged payment according to the tenor, &c.; and the plaintiff, in his replication, took issue on the allegation of payment as in the plea averred.

Per Cur.—The question in this case arising upon the record is, whether it was necessary to assign breaches of the condition of the bond stated in the pleadings, under the statute 8 & 9 Will. 3, c. 11, s. 8, and to assess the damages on those breaches. By that statute it is provided, “That, in all actions in any court of record, upon any bond, or on any penal sum for non-performance of any covenants or agreements contained in any indenture, deed, or writing, the plaintiff may assign as many breaches as he shall think fit, and the jury shall assess, not only such damages and costs as have heretofore been usually done, but also damages for such of the breaches as

Under 8 & 9 Will. 3, c. 11†, relief will not be granted where the condition is, that the principal shall become due on default of paying the interest.

Where a plea sets out the condition, and alleges payment of the sum named, the plaintiff may traverse the payment without assigning breaches, if the bond be not within the 8 & 9 Will. 3.

* Where the surety, after the death of the principal, paid the bond and took an assignment:—Held, that he could claim only as a simple contract creditor of his estate. (*Jones v. David* (Chancery) 4 Russ. 277).

† By s. 8, it is enacted, “That, on an action upon a bond, or any penal sum, for non-performance of any covenants or agreements in any indenture, deed, or writing contained, the plaintiff may assign as many breaches of the covenants and agreements as he shall think fit; and the jury, upon the trial of such action or actions, shall and may assess, not only such damages and costs of suit as have heretofore been usually done in such cases, but also damages for such of the said breaches so to be assigned as the plaintiff, upon the trial of the issues, shall prove to have been broken, and that the like judgment shall be entered on such verdict as heretofore hath been usually done in such like actions.”

Where the defendant does not plead, the statute provides, “That, if judgment shall be given for the plaintiff on demurrer, or by confession, or nil dicit, the plaintiff may suggest upon the roll as many breaches as he shall think fit.”

the plaintiff shall, upon the trial of the issues, prove to have been broken; and the like judgment shall be entered on such verdict as heretofore has been usually done." It then proceeds, after providing for cases of judgment on demurrer, or by confession, or nil dicit, to enact, "That, in case the defendant after such judgment, and before execution, shall pay into court to the use of the plaintiff, the damages assessed and costs, a stay of execution shall be entered on the record; or if, by reason of an execution, the plaintiff be fully paid all the damages and costs and charges of the execution, the defendant's body, lands, and goods shall be thereupon discharged from the execution; but the judgment shall notwithstanding remain as a further security to answer to the plaintiff such damages as he may sustain by any further breach of covenant." Now, in this case, it is contended, first, that this bond appears on the record to be for the performance of certain provisoes, conditions, stipulations, and agreements, contained in a certain indenture of assignment bearing even date with the said bond, and, consequently, that it is within the words of the statute. But we think the statute does not apply to this case. The bond, it is true, is for the payment of a sum of money on a day certain, with interest in the mean time, and the liability to pay those sums of money depends on the performance or non-performance of certain provisoes, conditions, stipulations, and agreements, contained in an indenture. But the defendant has upon the record averred in his plea payment according to those provisoes, &c., which averment is expressly denied by the replication, and the result of the verdict on this issue is, not that unliquidated damages in respect of the breach of those provisoes are due, but that the defendant is liable to pay the specific sum of money, for the securing of which the bond was given. Upon the whole, therefore, we are of opinion, that, under the circumstances stated on the record, this bond does not fall within the statute of William, and that no assignment of breaches was necessary.

CANTERBURY, ARCHBISHOP OF, *v.* ROBERTSON, H. T. 1834. Ex.
1 C. & M. 181.

The defendant pleaded non est factum to an action on a bond put in suit by order of the Prerogative Court:—Held, that the plaintiff might suggest as many breaches as he pleased.

AN order had been made by the Prerogative Court to put the bond in suit, but that Court had refused to limit the breach to be sued for to the non-payment of the residue of the sum due. The defendant pleaded non est factum.

Per Cur.—The Judge of the Prerogative Court has given a general order for putting the bond in suit, and the plaintiff is at liberty to assign breaches on any one of the conditions; and, we feel great difficulty in saying, that the Court can restrain him from suggesting as many breaches as he may think proper. To this declaration, the defendant might, upon oyer of the bond, have pleaded performance of the whole of the conditions, or performance of part, and suffered judgment by default as to the residue. Instead of taking that course, he pleads non est factum, which puts upon the plaintiff the necessity of suggesting breaches according to the statute, and a jury is summoned to inquire into the truth of those breaches.

HURST *v.* JENNINGS, T. T. 1826. K. B. 5 *B. & C.* 650; S. C. 8 *D. & R.* 424.

IN debt on a bond conditioned for payment of a sum on a given day, it appearing that the party, on the day of the date of the bond, executed an indenture declaring the purposes for which the bond was executed, and by which it was agreed that the plaintiffs, without notice, might enter up judgment and issue execution for the amount of any monies then due or thereafter to become due—

The Court held, that it was either a case directly within 3 Geo. 4, c. 39, or a contrivance to evade its provisions, and that the plaintiff was not entitled to issue execution without having first assigned breaches. Rule for withdrawing the execution made absolute.

Breaches must be assigned when the terms are not specified in the conditions, but in a collateral instrument*.

STOTHERT *v.* GOODFELLOW, M. T. 1832. K. B. 1 *N. & M.* 202.

DEBT on bond; two breaches were assigned, one good and the other bad; but the properly assigned breach was intermixed with and not distinct from the erroneous one.

The Court said, the one breach being well assigned, the circumstance of some of the allegations belonging to the badly assigned breach being introduced did not vitiate the good assignment.

Two breaches were assigned, one valid and the other insufficient:—Held, good, as to the former, though the latter was mixed up with it.

GILLINGHAM *v.* WASKETT, M. T. 1824. Ex. 1 *M. & C.* 568.

IN this case the plaintiff, pursuant to the statute 8 & 9 Will. 3, c. 11, s. 8, suggested on the roll the further breaches of the condition of the bond, by the non-payment of the dividends between the bringing of the action and the time when the last rule was confirmed, and proceeded by writ of inquiry of damages. The writ was executed before the Lord Chief Baron on the 6th July. The defendant conducted his own defence, making no objection during the trial on the ground of irregularity; and a verdict was found for the plaintiff. When the trial was concluded, the defendant objected, that he had been taken by surprise, having been previously left in total ignorance that the inquiry was to include the additional breaches.

Per Cur.—There is a rule, that it is quite agreeable to the course of practice to give the defendant a copy of the further breaches, in order that he may know against what case he is to defend himself; and the Court would make a rule if there was not one in existence.

Where further breaches are suggested, the defendant is entitled to notice of them before execution of the writ of inquiry.

SCOTT *v.* STACEY, T. T. 1838. C. P. 4 *Bing. N. S.* 724; S. C. 6 *Scott*, 598; S. C. 6 *D. P. C.* 714.—S. P. QUIN *v.* KING, H. T. 1836. Ex. 1 *M. & W.* 42; S. C. 4 *D. P. C.* 736.

A RULE, calling on the plaintiff to shew cause why the judgment should not be arrested in this action, or why a venire de novo should

There need be no special ve-

* On a bond to secure the payment of money by instalments:—Held, that, on the plea of non est factum, no breaches being suggested, the plaintiff was not entitled to speedy execution:—Held, also, that, under the plea of fraud and covin, it was not sufficient to shew that the consideration or good-will of a business was much less than had been represented, without going on to shew that the representations were untrue, to the knowledge of the party making them. (*D'Aranda v. Houston*, 1835, N. P., 6 C. & P. 512).

nire to enable the jury to assess damages where breaches are assigned in the replication.

not be awarded, on the ground that the award of venire, instead of being special, had been in the ordinary form—debt on bond for securing a sum of money, payable by instalments. The plaintiff did not, in his declaration, assign any breaches; but the defendant pleaded, setting out the conditions of the bond, and alleging performance. To this, the plaintiff replied, that arrears were due; and issue was joined on this, and a verdict was found for the plaintiff.

Per Cur.—The defendant, in his plea, sets out the conditions, and alleges performance; to which the plaintiff replies, that money is in arrear. It is competent for the jury to assess the damages on that issue, under the statute 8 & 9 Will. 3, c. 11, s. 8, without a special award of venire.

See Quin v. King, 1 M. & W. 42.

Borough. See *tit. County Rate—Corporation*.

Borough Courts. See *tit. Corporation*.

Bottomry and Respondentia Bonds*.

(See 4 Pet. Abr. 656).

EVERTH *v.* BLACKBURN, E. T. 1817. K. B. 6 *Mau. & Sel.* 152.

A bottomry bond given to

ASSUMPSIT on a policy of insurance on a bottomry bond, of which plaintiffs, who were partners, were obligees, and a person named

* *Respondentia bonds* are instruments entered into by the owners of a ship for the purpose of raising money to enable them to prosecute their destined voyage. By the *bottomry* bond the owners pledge the keel or bottom of the ship, which is used figuratively to express the whole body thereof, as a security for the repayment of the principal money advanced, and such interest as may be agreed upon, on this condition, that, if the ship be lost, the lender is not entitled to a return of his money. By the *respondentia* contract the borrower pledges not the vessel, but the cargo therein, which is in effect pledging merely his own personal responsibility; as, from the terms and nature of the transaction, it neither does nor can furnish the lender with any specific lien on the particular goods. There is also this further difference between bottomry and respondentia: the one is a loan upon the ship, the other upon the goods; in the former, the ship and tackle are liable, as well as the person of the borrower; in the latter, for the most part, recourse must be had to the person of the borrower only. There is this peculiarity attending the bottomry and respondentia contracts, that, on a loan upon bottomry, the lender runs no risk, though the goods should be lost; and, upon respondentia, the lender must be paid his principal and interest, though the ship perish, provided the goods are safe. But in all other respects the contract of bottomry and that of respondentia are upon the same footing; the rules applicable to one are applicable to both. (See 2 Blac. Com. 457, 458; Marsh. on Insurance, 738; Holt on Shipping, 125, 126; 2 Park on Insurance, 552). There is another species of contract, which does not exactly fall within the description of either, namely, a contract for the repayment of money, not upon the ship and goods only, but upon the mere hazard of the voyage itself; as, if a man lend 1000*l.* to a merchant, to be employed in a beneficial trade, with a condition to be repaid with extraordinary interest, in case a specific voyage named in the condition shall be safely

Janbyer the obligor, on a voyage from Bourdeaux to London. Plea, non assumpsit. The defendant had agreed, by a consolidation rule, to admit plaintiff's interest. It was objected, under the 6 Geo. 1, c. 18, s. 12, that the bottomry bond, having been executed to two persons, was void, the provisions of that statute applying to all associations of persons except the two corporations therein named. The plaintiff was nonsuited. A motion to set aside this nonsuit having been made—

Per Cur.—These plaintiffs lend their money upon bottomry in their character of partners, which the act prohibits, although they only occasionally lent their money for the purpose in question. The rule must be refused.

See Booth v. Hodgson, 6 T. R. 405; *Mitchell v. Cockburne*, 2 H. Bl. 379; *Aubert v. Moze*, 2 B. P. P. 371; *Sullivan v. Greaves*, Park Ins. 8, ed. 7th.

SIMONDS v. HODGSON, H. T. 1832. K. B. 3 B. & Ad. 50; S. C. 6 Bing. 114.

ASSUMPSIT on a policy of insurance on a bottomry bond. The bond as set out in the declaration was as follows—"I, the underwritten William Adams, commander of the schooner-brig *Clarence*, of Bristol in Great Britain, lying in the harbour of Copenhagen, having on my passage from St. Petersburg to London had the misfortune to run the said schooner-brig on shore upon Fosterborne Reef, coast Sweden, where she received considerable damage; and being unable to proceed in that state on her voyage, was compelled to put into this port to discharge and repair the damage. To pay the charges and expenses attending the said repairs, unloading and reloading, and putting the said ship in a state to proceed on her voyage, being loaded with a cargo of tallow, &c., I have borrowed and received from Messrs. Belfour, Ellah, Rainalls & Co., of Elsinour, the sum of 1077*l.* 17*s.* 9*d.* sterling, to pay for the above mentioned repairs, together with labourage, commissions, and other adherent expenses proceeding from the said misfortune, without which having been paid and done the said schooner-brig could not proceed on her destined voyage to London; and having received in hand the above-mentioned sum of 1077*l.* 17*s.* 9*d.* sterling, I bind myself, my heirs, administrators, and assigns, particularly the above-mentioned schooner-brig *Clarence*, together with all the apparel, tackle, boats,

two obligees is void by 6 Geo. 1, c. 18, s. 12*.

If it appears from the whole of a bottomry bond taken together, that it was the intention of the lender to take the risk of the voyage, it is valid, although the language of it does not expressly state such risk to be taken.

performed, which agreement is sometimes called *foenus nauticum*, or *usura maritima*. But the legislature has, by the 19 Geo. 2, c. 37, s. 5, made such a contract void.

See the subject of bottomry and respondentia very ably treated in Mr. Serjeant Shee's edition of Abbott on Shipping, p. 129, et seq.

* In debt on a bond purporting to be for a loan on respondentia on an East India ship, to which two sets of special pleas were pleaded, one set alleging usury, and the other illegality, under the statute 19 Geo. 2, c. 37, s. 5, it was left to the jury to say whether it was a bona fide transaction on respondentia, or a loan on usury:—Held, on motion for a new trial, the jury having found for the plaintiff, that the question was sufficiently left to the jury, and that it was not necessary, notwithstanding the provisions of the 19 Geo. 2, to leave it as a distinct question for them to say, whether the money was or was not lent to a person who had no interest in or goods on board the vessel. Semble, that pleas of illegality under the above statute should contain an allegation, that the money borrowed was not intended to be laid out in the purchase of goods to be put on board the vessel. (*Wynne v. Crosthwaite*, 4 C. & P. 178).

and stores of every kind belonging to the said schooner-brig, as well as her present freight and cargo, consisting of tallow, lathwood, &c., thankfully to consent and pay to the said Messrs. Belfour, Ellah, Rainalls & Co. aforesaid, or their attornies or assigns, the above-mentioned sum of 1077*l.* 17*s.* 9*d.* sterling, with 12 per cent. bottomry premium, all postages and reasonable charges attending recovering the same; and, putting aside all and every detention of law, arbitration, or reference, I do further hereby bind myself, said schooner-brig *Clarence*, her freight and cargo of every kind, to the full and complete payment of said sum, with all charges thereon, in eight days after my arrival at the above-mentioned port of London. And I do hereby make liable the said vessel, her freight and cargo, whether she do or do not arrive at the above-mentioned port of London, in preference to all other debts and claims; declaring hereby that the said vessel is at present free from all incumbrances whatsoever, and that this pledge or bottomry has now and must have preference to all other claims and charges, in any shape or manner, until such sum of 1077*l.* 17*s.* 9*d.* sterling, with 12 per cent. bottomry premium, making together 1207*l.* 4*s.* 8*d.* sterling, with lawful interest, and all charges are duly paid in money of *Great Britain*, or until the said Messrs. Belfour, Ellah, Rainalls & Co., of Elsineur, or their assigns, have declared themselves, in writing, fully satisfied with security given for such payment." To this declaration the defendant demurred; and the Court of Common Pleas gave judgment in favour of the defendant, that Court being of opinion that the lender did not take upon himself the risk of voyage. A writ of error being brought, that judgment was reversed.

Lord *Tenterden* delivered the judgment of the Court.—Instruments of bottomry are in use in all countries wherein maritime commerce is carried on. The lender of the money is entitled to receive a recompense far beyond the rate of legal interest; this recompense is very properly called in the civil law "*periculi pretium*," and of course no person can be entitled to it who does not take upon himself the peril of the voyage; but it is not necessary that his doing so shall be declared expressly and in terms, though this is often done; it is sufficient that the fact can be recollected from the language of the instrument considered in all its parts. It has been said, that such instruments being the language of commercial men, and not of lawyers, should receive a liberal construction to give effect to the intention of the parties. Here, the words of the instrument are,—“I bind myself, my ship and tackle,” &c., to pay the sum borrowed, with 12 per cent. bottomry premium, in eight days after my arrival in the port of London.” Now, if the words, instead of *eight days after my arrival*, had been *eight days after my ship's arrival*, there could have been no doubt that the lender took upon himself the peril of the voyage, if there be not in some part of the instrument some matter denoting a contrary intention. Now, the personal arrival of the master, unconnected with the ship, is a matter which it cannot be supposed that either party contemplated; it cannot be supposed that the lenders looked to him personally, or to his personal means, nor that he intended to pledge himself personally and absolutely for the payment, without regard to the means with which he might be furnished by the ship and her freight. And we are therefore of opinion, that the words, “my arrival,” must be understood to mean, my arrival with the ship, or my ship's arrival.

We are then to consider whether there be any thing in the instrument denoting an intention contrary to the interpretation we have given to this very unusual phrase—"my arrival." The sentence relied upon by the learned counsel for the defendant, as denoting such an intention, is in these words:—"And I do hereby make liable the said vessel, her freight and cargo, whether she do or do not arrive at the above mentioned port of London," &c. But we think that these words are intended to provide only for the ship's arrival in some other than the destined port, and, in such an event, to give the lenders a claim on the ship in preference to other claims; it cannot be intended to provide for the case of the loss of the ship, because, in that event, there would be nothing upon which a pledge could operate or a preference be claimed. For these reasons, we are of opinion that the judgment of the Court below must be reversed. Judgment reversed.

See 1 *Lev.* 54; 1 *Hag. A. Rep.* 169, 48; *Park. Ins.* 402, 403; 1 *B. & Ad.* 45; 3 *Burr.* 1394; 4 *Mau. & S.* 141; 4 *East*, 325.

Boundaries *.

REX *v.* WASHBROOK, M. T. 1825. K. B. 4 *B. & C.* 732; S. C. 7 *D. & R.* 221.

UPON a case from the Sessions for the opinion of the Court, it appeared that, by a private inclosure act, commissioners were directed to fix and settle the boundaries of a parish in a certain manner therein specified, and to advertise in a provincial newspaper a description of the boundaries so fixed and settled. The boundaries so

Boundaries advertised by one description, and stated in the commissioner's award by an-

* Boundaries are the utmost limit of land, whereby the same is known and ascertained. (4 *Inst.* 318). Courts of equity will grant commissions to ascertain boundaries. (1 *Mad. Chan. Prac.* 30). In such a bill it must be clearly shewn, that, without the assistance of the Court, they cannot be found; and a foundation must be laid for this relief by shewing, not merely that they are confused, but that the confusion has arisen from some misconduct of the defendant, or of those under whom he claims, of which the party has a right to complain, and which renders it incumbent on the defendant to co-operate with him in re-establishing them. Where it arose out of the unity of possession by the plaintiff's own tenants, and before the land came into the defendant's possession, and nothing was stated in the bill but the mere fact of confusion, the Court refused to interfere. (1 *J. & W.* 484). So, the Court refused to grant a commission to ascertain the boundaries of two rectories; (3 *Anst.* 801); and also refused a commission to settle the boundaries of a parish, or of a manor, where all parties who might probably be interested were not before the Court. (2 *Anst.* 386; *Id.* 392).

On a commission granted to a prebendary to ascertain boundaries against his lessees, who were also owners of freehold, &c., within his prebend manor, it was holden, that *quoad* the prebendal rights they constituted but one person, and he was, therefore, entitled to name as many commissioners as his lessees. (1 *Swanst.* 9). A commission was granted by consent to ascertain prebendal lands, become mixed with other freehold of the tenant by unity of possession, and to set out other lands where they could not be distinguished and ascertained. (2 *Meriv.* 509). In wastes, where there are no boundaries, the boundaries are generally settled by a line drawn by the eye, from one spot to another visible object. (5 *Dow.* 273).

Where felonies are committed on the boundaries of counties, or during passage through different counties, or on property of partners, or of counties, highways, parishes, commissioners of sewers, turnpike trusts, indictments are regulated by 7 *Geo.* 4, c. 64, ss. 14, 18.

other description, renders the award bad*.

fixed and settled were also to be inserted in the award of the commissioners, and to be final, binding, and conclusive. The commissioners having fixed and settled the boundaries in the mode specified, duly advertised a description of them, but the boundaries mentioned in the award varied from those which had been advertised.

Abbott, C. J.—The commissioners had a special power given to them by the inclosure act in question. They were to insert in their award that description of the boundaries which had been advertised, and then the award was to be final. They have not pursued that power; the award, therefore, as to the boundaries cannot be final.

THOMAS *v.* JENKINS, E. T. 1837. K. B. 1 N. & P. 588.

The boundaries of two farms being disputed:—Held, that evidence as to one, that it was the same as that of a hamlet, was receivable.

THE question in the cause was, whether a certain piece of land belonged to one sheep-walk or another. Witnesses were called, who stated to questions on the part of the defendant without objection, that the boundary of the plaintiff's farm was the same as that of the hamlet. They were then asked, what, according to reputation, was the boundary of the hamlet. This question was objected to, but the objection was overruled, and the defendant recovered a verdict.

Per Cur.—When once the fact has been established, that the boundaries of the two are identical, any mode of proving what the boundary of the hamlet is, was admissible. It seems, that, no objection being taken to the question, it was answered, that the boundary of the farm was that of the hamlet; and then it was inquired, what was the boundary of the hamlet. Many observations might be made upon the nature of this evidence, but the two questions were inseparable. The case is the same as if one party had sold his estate, with an express reference to the boundary of the hamlet, when there can be no question that that boundary could be inquired into.

BRISCO *v.* LOMAX, E. T. 1838. Q. B. 2 N. & P. 388; S. C. 8 Ad. & E. 198.

So, on a question of boundary between two manors, the finding of the jury upon an inquisition, is evidence of the boundary.

IN a cause where the question was, whether the locus in quo was parcel of the manors of Wakefield or Rochdale, it was shewn, that Wakefield and Rishworth were adjoining manors, and that the manor of Rochdale adjoined both Wakefield and Rishworth continuously. The plaintiff produced in evidence a commission to ascertain the boundaries between the manors of Rochdale and Rishworth, issued out of the Duchy Court of Lancaster in the reign of Charles I., which recited that the boundaries were uncertain; and that, as disputes were likely to arise, the respective lords of those manors had prayed that a commission might issue to prevent them. Upon this commission there was an inquisition, and a verdict, which set out the boundaries, and was returned to the Court, but no decree thereon was produced.

The Court held, 1st. that it was admissible as a verdict upon the matter decided by it, namely, the boundaries of Rochdale and Rishworth, but not as reputation simply; 2nd. that, although the lord

* Under a commission to ascertain boundaries, those having any interest in the lands are necessary parties. (*Bayley v. Best*, (Chancery), 1 Russ. & M. 165).

of the manor was a party to it, it was not conclusive upon his representative in this action, in which a third party was the plaintiff; and, as it was not conclusive, the circumstance of there being no decree was immaterial.

EVANS v. REES, E. T. 1840. Q. B. 2 P. & D. 627; S. C. 10 Ad. & E. 151.

UPON a former issue on a question of boundary, in an action by a third party against the plaintiff, he obtained a verdict. The cause having been referred—

The Court held that, in the action by the plaintiff against the defendant raising the same issue, the verdict in the former action was receivable as evidence of reputation, but not the award, which was only the finding of an individual. Held, also, that an ancient presentment by the homage of a manor, in the form of a book, in which the boundaries were set out, and concluding with an alphabetical list of the parishes and tenants, but the latter part, containing the name of the parish in dispute, mutilated, was admissible as evidence of the reputed boundary, the part relating to the boundary being perfect.

So, a verdict is evidence of reputation, where the now plaintiff was a defendant in a former suit.

TALBOT v. LEWIS, H. T. 1835. Ex. 5 Tyrw. 1.

IN trespass brought by the lord of a manor, for the carrying away dollars claimed by him as wreck, two instruments, dated in 1639 and 1657, and purporting to be presentments or answers of a jury, partly consisting of the tenants of the manor, to questions by commissioners of survey appointed by the then lord, were put in to prove the boundaries of the manor, and also the lord's title to wreck, which was affirmed in particular passages.

So, presentments,

The Court held, that they were only evidence of the boundaries, and could not be admitted as declarations by the tenants of the manor of the title of the lord to wreck, that being a matter of private right derived from the Crown, respecting which they could not be taken to have any peculiar knowledge, as they had no concern with it.

NEWCASTLE (DUKE OF) v. BROXTOWE, E. T. 1832. K. B. 1 N. & M. 598; S. C. 4 B. & Ad. 273.

ON a question of boundary, the following document was given in evidence :—" 3rd April, 2nd October, 1654, and 7th January, 1654-5, 14th April, 1655, and January, 1660, entries in a book of orders, made at the quarter sessions, wherein it is stated that the castle and brewhouse were in the *Hundred of Broxtowe*." A question being raised whether these orders could be read, either as judgments of the court of quarter sessions, or as evidence of reputation, the learned Judge held that they were admissible, and allowed them to be read. On motion for a new trial—

and ancient orders of sessions are evidence.

The Court said, the document was admitted, not as orders upon matters over which the magistrates had jurisdiction, but as *evidence of reputation*; and in that point of view we are of opinion that they were admissible. Four of them contain an express statement; the fifth an implied one, that the castle (or the brewhouse, or the park of Nottingham, which belong to it) is within the wapentake, or hundred of Broxtowe. The statement is made by the justices of

the peace assembled in sessions; who, though they were not proved to be residents within the county or hundred, must, from the nature of their offices alone, be presumed to have sufficient acquaintance with the subject to which these declarations relate; and the objection cannot prevail, that they were made after a controversy upon that subject had arisen, because there appears to have been no dispute upon the particular question, whether the castle and its precincts were in the hundred of Broxtowe. These statements, therefore, fall within the established rule as to the admission of evidence of *reputation*.

Brawling*.

Ex parte WILLIAMS, T. T. 1825. K. B. 4 B & C. 313; S. C. 6 D. & R. 373.

Brawling was an offence at common law. The statute of 5 and 6 Edw. 4, c. 4,† imposed

A SUIT for brawling was instituted before the commissary of a bishop. The commissary, by letters of request, transmitted the suit to the Arches Court of Canterbury. The official principal of that court issued a citation, and articles were exhibited against Wil-

* This was an offence at common law, and is thus defined by the 5 & 6 Edw. 6, c. 4, s. 1:—"If any person shall, by words only, quarrel, chide, or brawl, in any church or churchyards, it shall be lawful unto the ordinary of the place where the same offence shall be done and proved by two (sed vide, Hagg Rep. 181) lawful witnesses, to *suspend every person so offending*, if he be a layman, from the entrance of the church; and if he be a clerk, from the ministration of his office, for so long time as the said ordinary shall think meet, according to the fault." Therefore, a party may now proceed either upon the statute or on the ancient law. The Court will consider time and place in cases of "chiding, quarrelling, and brawling." That may be "chiding" or "brawling" in the church which would not be so in the vestry. The vestry is a place for parish business; and the Court would not interfere further than might be necessary for the preservation of due order and decorum (1 Hagg. Rep. 184-5). Suspension of a parishioner *ab ingressu ecclesiæ*, prescribed by 5 & 6 Edw. 6, c. 4, was limited to a month only, under certain circumstances (*Clinton v. Hatchard*, 1 Add. Rep. 96); and in another case (*Canning v. Sawkins*, 2 Phill. Rep. 293), for brawling in a church, to three weeks, with notification in the church of such suspension in the latter case, and costs in both. In *Cox v. Gooday* (2 Hagg. Rep. 138), a clergyman was suspended for a fortnight for words spoken during divine service, by way of admonition of a passionate tenor, though expressed without any tone of passion. Costs were prayed; but the report does not notice whether they were granted. In *Lage v. Alton* (Cro. Jac. 462), a prohibition was prayed upon the statute, because that costs were given in the spiritual Court; but it was denied by the Court, the costs being there for the expenses of the suit; otherwise, if it had been for damages. This being a criminal proceeding, the office of the judge wrongly promoted, by misnomer of the judge in a copy of the articles for this offence, is fatal (1 Hagg. 1). And semble, the articles should be in his name as vicar-general and official principal (Hagg. 4). As to evidence of brawling, see 3 Phill. Rep. 120.

† The 5 & 6 Edw. 4, c. 4, comprehends brawling and smiting in a vestry-room, within the precincts of the churchyard (*Lee v. Mathews*, 3 Hagg. Rep. 169). Upon a charge of brawling, being clearly of ecclesiastical cognizance, the only question is, whether the articles contain a substantive charge of brawling and riot in a sacred place; and the Court, upon the question of admitting the articles, cannot attend to a suggestion that they do not fully nor truly state all the circumstances; nor can any occasion or provocation justify such acts. Where the charge was only partially proved, the Court admonished the party, and condemned him in 20*l.*, nomine expensarum. (*Jarman v. Bagster*, 3 Hagg. (Cons.) 336).

But where the conduct of the defendant was very violent, and his language highly indecorous, although at a vestry meeting for secular purposes, the Court condemned him *ab ingressu ecclesiæ* for a fortnight, and in 35*l.* nomine expensarum. (*Jarman v. Wise*, 3 Hagg. (Cons.) 360).

liams, who first put in a negative plea, then withdrew it, and put in a plea of justification, and afterwards obtained in this Court a rule nisi for a prohibition.

Per Cur.—The 5 & 6 Edw. 6, c. 4, gives jurisdiction in cases of brawling to the ordinary: that does not mean the bishop of the diocese, so as to limit the jurisdiction to him alone, but the ordinary judge. Besides, the offence of brawling was not created by the 5 & 6 Ed. 6, c. 4, but a new penalty only thereby imposed; it was before cognizable by the spiritual courts. (*Kenmouth v. Collins* 2 Ld. Raym. 850). The party promoting the suit has, therefore, a right to remove it, provided the inferior judge thinks fit. Now, one mode of exercising his authority is by letter of request to the archbishop or his substitutes.

a new penalty; and such a suit may be removed from the bishop to the Court of Arches.

WILLIAMS v. GLENISTER, E. T. 1824. K. B. 2 B. & C. 699; S. C. 4 D. & R. 217.

THE minister, after performing the communion-service, was walking from the table to the vestry-room; a person rose in the church, and read a notice requiring the inhabitants to meet in the vestry respecting the churchwardens. The constable, at the request of the minister, took the person out of the church, and detained him until he gave his word to appear before a magistrate the next morning, where he did appear and was discharged. In trespass—

Reading a notice of vestry aloud in church is not brawling.

Per Cur.—The question for our consideration is, was this act done by the plaintiff wilfully and maliciously, on purpose to disturb the minister and the congregation? Was it directed against the priest? On the contrary, the plaintiff conceived that, without this notice, he could not accomplish a legal purpose. He chose a time when no part of the service was being performed. The statute of Edward only gives a common law punishment for an ecclesiastical offence; and as the object of reading the notice was not to disturb the minister, and he in fact was not disturbed in the performance of any part of his duty, the constable had not any power to turn the plaintiff out of the church. The Toleration Act does not carry the case any further. Rule refused.

See 27 Geo. 3, c. 44; *Lord Raymond's Rep.* 850; and *Hawkins' Pleas of the Crown*, c. 63.

Breach, Assignment of. See tits. *Bond—Covenant*.

Breach of the Peace. See tits. *Assault and Battery—Articles of the Peace*.

Breach of Prison. See tits. *Escape—Prisons—Rescue*.

Breach of Promise of Marriage. See tit. *Marriage*.

Bread.*

* See statutes 2 & 3 Edw. 6, c. 15; 31 Geo. 2, c. 29; 32 Geo. 2, c. 18; 3 Geo. 3, c. 11; 36 Geo. 3, c. 22; 37 Geo. 3, c. 98; 38 Geo. 3, c. 62; 39 & 40, Geo. 3, c.

Brewer.

See *tits. Ale and Alehouse—Beer.*

ATTORNEY-GENERAL *v.* OVERINGTON, M. T. 1829. Ex. 3 F. & J. 440.

A licence to brew at A., and retail at B., does not entitle the brewer also to retail at C., under 5 Geo. 4, c. 54.

A BREWER at a place called Wickham, and that not being a market town or city, had obtained a licence to retail the beer brewed at Wickham in a neighbouring market town—at Portsea. He had in addition a brewery at Chichester, some distance from Wickham, and there brewed; and Chichester being a city or market town, he obtained a licence to retail from the premises of that brewery. The defendant had sent his strong beer brewed at Wickham, and for the retail of which at Portsea he had obtained a licence, to his premises at Chichester, a distant brewery; and having obtained a licence to retail from the premises at Chichester, he had from thence retailed the beer brewed by him at Wickham. Under these circumstances, the question for the consideration of the Court was, whether the defendant was liable, under the provisions of the 5 Geo. 4, c. 54, to any penalty for retailing the beer brewed by him for that purpose at Portsea; that is, whether he is liable for retailing at Chichester the beer brewed by him at Wickham, Portsea being the only place where it is permitted to him to retail that beer.

Per Cur.—This case turns upon the construction of the 5 Geo. 4, c. 54. The first section enacts, “That it shall be lawful for any brewer or brewers of strong beer only in Great Britain for sale, who shall have taken out and paid for his, her, or their licence to brew, at and after the rate of two pounds at the least, to retail such beer from the premises where such beer is or has been brewed.” That is the clause which gives the defendant authority to retail the beer which he has brewed from the premises where it is brewed. It will appear, and it was so argued, and very properly argued, that the question turns upon the construction of the word “such,” whether the words “such beer” mean any beer of that description, or whether they mean any strong beer, or beer brewed at the particular brewery of the party appointed for the retail of it by the licence. It is a case of which much cannot be made by argument; but it seems to us that “such beer” means beer brewed upon those premises. It can mean nothing else; it does not mean any beer brewed any where of that description; but it means beer brewed upon those premises, which may be retailed upon the same premises. The next clause, sect. 7, is—“That when the entered premises for brewing shall be situate out of a city or market town, and such brewer shall, by reason thereof, not retail beer, or be licensed as aforesaid to retail beer, it shall and may be lawful for any such brewer or brewers to make entry of some one place, room, warehouse, cellar, shop, house or outhouse, for the retail of beer, in any one adjoining city or market town, and to take out a licence for and retail the strong beer brewed

74; 41 Geo. 3, c. 12; 53 Geo. 3, c. 116; 55 Geo. 3, c. 99; and the 1 & 2 Geo. 4, c. 50, and 3 Geo. 4, c. 106, which repealed the earlier statutes, and made new provisions; but the 3 Geo. 4, c. 106, is repealed by 6 & 7 Will. 4, c. 37, which is the statute now in force.

by him at such brewery as aforesaid, to be drunk or consumed elsewhere; subject, nevertheless, to the several provisions and penalties herein contained and imposed relating to brewers retailing beer from the premises where brewed." Now, this whole scheme seems to us to be quite intelligible and consistent. Where a brewery is erected in a place of considerable population, the excise officers may license a brewer to retail from those premises at that place, and it is worth the while of the brewer to pay for a licence for that purpose; but when it is not in such a city or market town, then the brewer may apply to have permission to retail his beer, brewed in that place, in some neighbouring city or market town; and the legislature has taken particular care to express that it shall be only one place, only one market town or city. The words of the act expressly limit it to one place in one neighbouring city or market town. It is impossible that words can be stronger. We think, therefore, that the defendant is not warranted by either of these clauses in sending beer brewed at Wickham, not a market town or city, to Chichester, where he has another brewery, to retail that beer under a licence which ought to be confined to retail beer brewed only at that particular brewery at Chichester.

Bribery*.

HENSLOW *v.* FAWCETT, E. T. 1835. K. B. 4 *N. & M.* 585; S. C. 5 *Ad. & E.* 51.

IN debt for penalties under 2 Geo. 2, c. 24, it appeared, that the defendant went to the voter, Garner, and after some preliminary conversation, offered him a sum of money for his vote for Mr. Knight, to which Garner said, "Why, you gave Mr. B., my neighbour, more

To constitute bribery under 2 Geo. 2, c. 24, s. 7†, the voter need not vote.

* Bribery is the receiving or offering any undue reward by or to any person whatsoever, whose ordinary profession or business relates to the administration of public justice, or some public duty, in order to influence his behaviour in office, and incline him to act contrary to the known rules of honesty and integrity. (See 1 Hawk. P. C., c. 67, 1 & 2; 4 Blac. Com. 139; 3 Inst. 149)

† Which enacts, "That, if any person who shall have a claim to have any right to vote in any election of any member to serve in Parliament, shall ask, receive or take any money or other reward by way of gift, loan, or other device, or agree or contract for any money, gift, office, employment, or other reward whatsoever, to give his vote, or refuse or forbear to give his vote in any such election, or if any person by himself, or any person employed by him shall, by any gift or reward, or by any promise, agreement, or security for any gift or reward, corrupt, or procure any person or persons to give his, her, or their vote or votes in any such election, such person so offending in any of the cases aforesaid shall, for every such offence, forfeit 500*l.*; and further, that such offender, after judgment against him in any action or information, or summary action or prosecution, or being otherwise lawfully convicted thereof, shall for ever be disabled to vote in any election of any member to serve in Parliament, and to hold any office or franchise, as if such person was naturally dead." Before the passing of that act, by 7 & 8 Will. 3, c. 7, it was enacted, "That, if any person should make, or give any contract, promise, bond, or security, or any gift or reward, to procure a false or double return of any member to serve in Parliament, he should forfeit the sum of 300*l.*: one-third to the king; one-third to the poor of the county, city, borough, or place concerned; the remaining third to the person who should sue for the same

than that;" and ultimately the defendant did give to the voter, Garner, the sum of 5*l*. In point of fact, Garner never did vote for Mr. Knight, but voted on the contrary for the other candidate.

Per Cur.—The words of the act are, "If any person shall corrupt or procure to vote;" and, it seems to us, that "corrupt" and "procure" are distinct, and have separate meanings. "Procure" applies to the voter corrupted having actually given his vote, and "corrupt" to having given the voter a sum with a view of procuring him to vote; and, it seems to us, that a party may be guilty of the latter whether the voter actually does vote or not.

See *S. P. Salston v. Norton*, 3 *Burr.* 1235; *S. C.* 1 *W. Bl.* 317.

by action of debt, bill, plaint, or information." But a recent statute, (49 Geo. 3, c. 118), after reciting, that the giving money, &c., in order to procure the return of a member to Parliament, if not given to or for the use of some person having a right, or claiming to have a right, to act as returning officer, or to vote at the election, is not bribery within the former statute, (2 Geo. 2, c. 24), enacts, "That, if any person shall give or cause to be given, directly or indirectly, or promise or agree to give any money, gift, or reward, upon any engagement or agreement that the person to whom, to whose use, or on whose behalf such gift or promise shall be made, shall, by himself or by any other, at his request or command, procure, or endeavour to procure, the return of any person to Parliament for any place, he shall, if not returned himself to Parliament for such place, for every such gift or promise forfeit 1000*l*.; and, if returned, and having given, or promised to give, or knowing of and consenting to such gifts or promises, shall be disabled and incapacitated to serve in that Parliament for such place, and shall be as if he had never been returned or elected a member of Parliament." And it enacts, also, "That any person who shall receive or accept of by himself, or by any other to his use or on his behalf, any such money, gift, or reward, or any promise upon any such engagement, contract, or agreement, shall forfeit the value and amount of such money, gift, or reward, over and above the sum of 500*l*." By sect. 2, it is enacted, "That if any person shall by himself, or by any other, give, or procure to be given, or promise to give or procure to be given, any office, place, or employment, upon any express contract or agreement, that the person to whom or to whose use, or on whose behalf, such gift or promise shall be made, shall by himself, or by any other, at his request or command, procure or endeavour to procure the return of any person to Parliament for any place, such person so returned, and so having given, or procured to be given, or so promised to give or procure to be given, or knowing of and consenting to such gift or promise, upon any such express contract or agreement, shall be disabled and incapacitated to serve in that parliament for such place, and be deemed no member of Parliament, and as if he had never been returned; and any person who shall receive or accept of, by himself, or by any other to his use or on his behalf, any such office, place, or employment, upon such express contract or agreement, shall forfeit such office &c., and be incapacitated for holding the same, and shall forfeit 500*l*." And it further enacts, "That any person holding any office under his Majesty, who shall give such office, appointment, or place, upon any such express contract or agreement, that the person to whom, or for whose use, such office, &c., shall have been given, shall so procure or endeavour to procure the return of any person to Parliament, shall forfeit 1000*l*."

The 11th section of the 2 Geo. 2, c. 24, relative to bribery at elections, provides, "That no person shall be liable to any incapacity, disability, forfeiture, or penalty, unless a prosecution be commenced within two years after the incapacity, &c., shall be incurred; or, in case of a prosecution, the same be carried on without wilful delay." And by 49 Geo. 3, c. 118, s. 4, it is enacted, "That no person shall be liable to any forfeiture or penalty imposed by the act, unless some prosecution, action, or suit for the offence committed, shall be actually and legally commenced against such persons within two years next after the offence committed, and unless such person shall be arrested, summoned, or otherwise served with the writ or process within the same space of time; so as such arrest, summons, or service shall not be prevented by such person absconding or withdrawing out of the jurisdiction of the Court, and in any prosecution, suit, or process, the same shall be proceeded in and carried on without any wilful delay." As to the evidence for, see 4 & 5 Vict. c. 57.

WEBB v. SMITH, E. T. 1838. C. P. 4 *Bing. N. S.* 373; S. C. 6 *Scott*, 147.

DEBT for penalties under the 2 Geo. 2, c. 24, s. 7, for bribery. It was proved, that the defendant sat upon the day mentioned in an outer room, and having held some conversation with the voter gave him a price paper or ticket, upon which his name was written. This the voter took into an inner room, and delivered it to another person whom he found there, and who gave him the sum of 10*l*. A verdict was found for the plaintiff. On motion for a new trial—

Per Cur.—What were the facts of the case? The defendant gave a ticket which was taken from an outer to an inner room, where the money was received. He himself, it is true, did not give the money; and we agree, that, if that which was given was a security, or what the statute calls a security, for any gift or reward, such fact should have been proved as stated, and it would not be sufficient to charge the giving of a bribe of one description and prove the giving of another; but if, as here, facts are substantially proved by evidence, if evidence is given sufficient to complete and prove all the links, what objection can be advanced? Here the voter goes to the inner room and takes the money. The question then is, had the defendant in the outer room a guilty knowledge of the money being thus taken? Suppose the party had gone, not to another room, but to a drawer in a corner of the room, what would the inference be? Is not this, we ask, one of the innumerable modes resorted to for the purpose of defeating the ends of justice? Under such circumstances, if this is not a direct, immediate, actual delivery of the money by the hands of the defendant, it certainly is such a one as in intendment of law amounts to a delivery by him.

The declaration stated, that defendant did corrupt one A. B. to vote by giving him the sum of 10*l*.:—Held, to be proved, by shewing that the defendant gave a ticket to be presented to another man, who gave the 10*l*.*

Bricks. See 17 *Geo. 3, c. 42*.

Brickmaker. See *tit. Bankrupt*.

Bridges†.

I. RELATIVE TO THE ERECTION OF, p. 436.

II. RELATIVE TO WHAT IS A BRIDGE, AND WILL BE DEEMED PUBLIC, p. 436.

III. RELATIVE TO THE OWNERSHIP IN THE MATERIALS, p. 437.

* If a person who is not himself a candidate, and who is not known to the party who supplies refreshments to be an agent of a candidate, order supplies for the voters, he is personally liable to pay; and the Treating Act, (7 & 8 Will. 3, c. 4), will afford him no defence if the goods were supplied entirely on his credit. (*Parke, B.*—*Thomas v. Harris*, 1835, N. P., 6 C. & P. 615).

† As to repairing, improving, and widening county bridges, see 4 & 5 Vict. c. 49.

IV. RELATIVE TO THE REPAIRING AND WIDENING OF.

- (a) WHO ARE BOUND TO REPAIR OR WIDEN, p. 437.
- (b) OF THE DISTANCE TO WHICH THE LIABILITY TO REPAIR EXTENDS, p. 440.
- (c) OF THE INDICTMENT AND PROCEEDINGS INCIDENT THERETO, p. 440.

V. RELATIVE TO DESTROYING OR DAMAGING OF, p. 441.

I. RELATIVE TO THE ERECTION OF*.

II. RELATIVE TO WHAT IS A BRIDGE, AND WHAT WILL BE DEEMED PUBLIC†.

REX v. WHITNEY, E. T. 1835. K. B. 4 N. & M. 594.

What is a bridge, is a question of fact; but where the Judge decided that point, the Court refused a new trial.

INDICTMENT for not repairing a road. It appeared that a portion of the road in question was over an edifice which, on the part of the prosecution, it was contended was a culvert; and, for the defence, that it was a bridge. It was over a flowing stream of water, having a stone arch of nine feet in space, and having no parapets. *Park, J.*, on the evidence of surveyors as to what constituted a bridge, told the jury that in his opinion, as this building had no parapets, it was a culvert, and not a bridge; and the jury found a verdict of guilty.

Per Cur.—We cannot interfere. The question whether this was a culvert or bridge was a question of fact, rather than of law; and if the Judge had said, that without a parapet it could be no bridge, he would have been wrong; but when it is put to the Judge to de-

* No person can erect a public bridge without a licence and an ad quod damnum. (*Payne v. Partridge*, E. T. 1691, K. B., 1 Salk. 12; S. C. 1 Show. 257). A bridge built in a public way, without public utility, is indictable as a nuisance; (*Rex v. The Inhabitants of the West Riding of Yorkshire*, E. T. 1802, K. B., 2 East, 342); if the public do not adopt it by passing over it. (*Rex v. The Inhabitants of the County of Kent*, E. T. 1814, K. B., 2 M. & Selw. 513). Merely using the bridge unavoidably, does not amount to an adoption. (*Rex v. Kerrison*, H. T. 1815, K. B., 3 M. & Selw. 526.—S. P. *Rex v. The Inhabitants of Kent*, 13 East, 220.—S. P. *Rex v. The Inhabitants of Lindsay*, 14 East, 317).

† Whether a bridge can be deemed a public one does not depend on its description, nor on its projector: hence, a bridge of public utility, built by an individual, dedicated to and accepted by the community, is a public bridge; (*Rex v. The Inhabitants of Bucks*, H. T. 1810, K. B., 12 East, 192.—S. P. *Rex v. The Inhabitants of Yorkshire*, E. T. 1802, K. B., 2 East, 342.—S. P. *Rex v. The Inhabitants of Glamorgan*, H. T. 1788, K. B., 1d. 356, n.); whether it be a foot, horse, or carriage bridge. (*Rex v. The Inhabitants of the County of Salop*, M. T. 1810, K. B., 13 East, 95). Nor is it necessary that it should be always open, for a bridge may be viewed as a public one if the dedication to the community be absolute, although definite as to time. (*Rex v. The Inhabitants of the County of Northampton*, M. T. 1814, K. B., 2 M. & Selw. 262.—S. P. *Rex v. The Inhabitants of the County of Devon*, 1 R. & M. 144).

A bridge open at all times to the public is not the less a public bridge, though the public use it only in time of floods; and the county is therefore liable to repair it. (*Rex v. Inhabitants of Devon*, 1824, N. P., 1 Ry. & M., 144).

termine whether it was a bridge or a culvert, the answer of the Judge, that it was, in his opinion, a culvert and part of the road, must be considered as containing his opinion in point of fact, and not as taking upon himself to decide that it was in point of law.

III. RELATIVE TO THE OWNERSHIP IN THE MATERIALS*.

IV. RELATIVE TO THE REPAIRING AND WIDENING OF.

(a) WHO ARE BOUND TO REPAIR OR WIDEN.

REX v. INHABITANTS OF DERBY, H. T. 1832. K. B. 3 B. & Ad. 147.

THIS was a presentment for the non-repair of a bridge over the river Amber in the county of Derby. The defendants pleaded that the bridge was erected after the passing of the 43 Geo. 3, c. 59, by certain persons appointed under a local act of the 57 Geo. 3, for making and maintaining a turnpike road, as trustees for carrying that act into execution, and by virtue of certain powers given to the trustees by virtue of that act; and that the same was not erected in a substantial manner, under the direction or to the satisfaction of any person appointed by the justices of the peace of the said county at their general quarter sessions assembled, according to the form of the statute in such case made and provided. To this plea there was a demurrer.

Per Cur.—The 43 Geo. 3, c. 59, s. 5, comprehends every kind of persons by whom any bridge shall be built, and therefore includes trustees of a turnpike; and a bridge built by them, not under the direction or to the satisfaction of the county surveyor, is not one for which the county could be made liable to repair.

All persons by whom bridges are erected come within the 43 Geo. 3, c. 59†.

REX v. INHABITANTS OF LANCASHIRE, M. T. 1831. K. B. 2 B. & Ad. 813.

THIS was an indictment against the inhabitants of the county of Lancaster for not repairing a bridge called Leigh Bridge. The bridge in question was erected sixty or seventy years ago under a local turnpike act, and long previous to the 43 Geo. 3, c. 59. But since the passing of that act, that is, within twenty years, the bridge had been enlarged and widened by the trustees under the local act;

But a repaired or widened bridge is not a new bridge within the 43 Geo. 3, c. 59.

* The property in the materials of a bridge dedicated to the public, built by a party under licence on the soil of another, remains in the builder, subject to the right of passage; hence, he may have trespass for taking them away when severed. (*Harrison v. Parker*, H. T. 1805, K. B., 5 East, 154; S. C. 2 Smith's Rep. 262). But under the 49 Geo. 3, c. 59, s. 4, actions brought for injuries done to public bridges shall be in the name of the surveyor.

† By which it is enacted, "That no bridge thereafter to be built in any county, at the expense of any private person or body politic or corporate, shall be deemed a county bridge which the inhabitants of any county shall be compellable or liable to maintain or repair, unless such bridge shall be erected in a substantial and commodious manner, under the direction or to the satisfaction of the county surveyor."

and it was for not repairing the bridge so enlarged that the indictment was found.

Per Cur.—Before the passing of the act of 43 Geo. 3, c. 59, the county was liable to repair every bridge, by whomsoever it might be built, provided it was useful and beneficial to the public. The act was passed in order to define the bridges which might be built after the passing thereof, for the repairing of which the county should be liable—"for the more clearly ascertaining the description of bridges, hereafter to be erected, which inhabitants of counties shall and may be bound and liable to repair and maintain." The present is a case omitted to be provided for by the act of Parliament; probably it is a case that did not occur to the framers of that act. We cannot say that the widening of a bridge is the erecting and building a new bridge within the meaning of that act of Parliament.

REX v. INHABITANTS OF DEVON, T. T. 1833. K. B. 5 B. & Ad. 383; S. C. 2 N. & M. 212.

So a bridge erected before, but washed away after the statute passed, when rebuilt, though widened, is not a new bridge within the statute.

THE bridge in question was formerly a horse bridge; but before the passing of the 43 Geo. 3, c. 59, it had been widened at the expense of the parish of Ottery, so as to become a bridge for the passage of carts and carriages, and had been so used. In 1807, a great flood carried away the bridge, leaving the stone abutments on either side. The bridge was reconstructed, and made wider at the expense of the parish, on the same site, using the stone abutments of the former bridge. No notice, according to the 43 Geo. 3, c. 59, had been given to the county surveyor on occasion of the reconstruction. For the defendants it was contended, that the bridge must be considered as a bridge built since the passing of the above act; and consequently that the non-compliance with the provisions respecting the county surveyor exempted the county from liability.

But the Court held it was not a new bridge within the statute.

REX v. INHABITANTS OF OXFORDSHIRE, T. T. 1825. K. B. 4 B. & C. 194; S. C. 6 D. & R. 231.

The primary liability of the county to repair is not taken away by trustees being liable under an act of Parliament; at all events, it must be shewn that the latter have funds.

INDICTMENT against a county for not repairing a bridge in a public highway. Plea, that by a certain act of Parliament for improving &c., this road, certain trustees were directed to lay out the tolls thereby granted in repairing the roads, and were empowered to make and repair bridges; that the bridge in question was erected by the trustees by virtue of that act; and that the trustees were liable and ought to repair. Replication, that the trustees were not liable to repair.

The Court held that the bridge, being in the first instance built for public purposes, and not for private convenience, in a public highway, the county was not exonerated from that common law liability to repair it which attached as soon as it was built. The plea was also bad, because it did not allege that the trustees had funds sufficient for the repair of the bridge, and for the other purposes for which the tolls were imposed; and even if that fact had been alleged and proved, the county would be liable, and would be left to their remedy over against the trustees by indictment for not repairing the bridge.

See *Rex v. West Riding of Yorkshire*, 2 East, 342; *Rex v. Nether-hong*, 2 B. & Ald. 179.

REX v. INHABITANTS OF MIDDLESEX, H. T. 1832. K. B. 3 B. & Ad. 201.

UPON an issue, whether a public foot-bridge was parcel of a carriage bridge, to the repair of which an individual was liable *ratione tenuræ*, it appeared that certain abbey lands had been ordained for the repairs of the carriage bridge, and that the proprietors of those lands had always repaired it; and that, at a later period, the turnpike trustees had, with the consent of a certain number of those proprietors, constructed a wooden foot-bridge on the outside of the parapet of the old bridge, partly resting thereon, and partly connected with it by brickwork and iron pins.

The Court held, that, as the bridge was a distinct structure, the county was bound to repair the foot-bridge.

And where an individual was liable *ratione tenuræ* to repair a carriage bridge, to which bridge the county attached a foot-bridge:—Held, that the county was bound to repair the latter;

REX v. OXFORDSHIRE, T. T. 1830. K. B. 1 B. & Ad. 289.

ON an indictment for non-repair of a bridge, it appeared that the bridge was erected over meadows, which were occasionally flooded by a river, with arches which were necessary for the safety of the main bridge, in order to let off the flood water.

The Court held that the county was not liable to repair such of the arches as were at the distance of more than 300 feet from the end of the main bridge. The definition of a bridge, for the purpose of considering the liability of the county to repair, being that which is erected for the passage "over water flowing in a channel between banks, more or less defined."

but the bridge must be over "water flowing in a channel," and not a mere "passage of flood water," to render the county liable*.

REX v. INHABITANTS OF DEVON, H. T. 1825. K. B. 4 B. & C. 670; S. C. 7 D. & R. 147.

AN indictment against a county for not repairing a bridge, after stating it was dangerous, alleged that the bridge during all that time was and yet is too narrow, so that the subjects of the king upon and over it, on foot, and with their horses and carriages, could not and cannot pass and repass without great danger to their lives, as they ought to do, but were and yet are greatly obstructed in the going and returning upon and over the same; and that during all that time they were and yet are in great danger of being overturned in their carriages, and of being killed, owing to the narrowness of the same.

Per Cur.—We are of opinion that the inhabitants of a county who are liable to repair a bridge are not bound to widen it. There is not any express authority that the law has imposed that burden upon them.

There is no means of compelling a county to widen a bridge.

* If by statute a town becomes part of a hundred, and the inhabitants of each are directed to do the same things, the hundred may be charged by prescription to repair a bridge in the town. (*Rex v. Oswestry*, 6 M & S. 361).

(b) OF THE DISTANCE TO WHICH THE LIABILITY TO REPAIR EXTENDS.*

REGINA v. MAYOR OF LINCOLN, E. T. 1838. Q. B. 3 N. & P. 273; S. C. 3 A. & E. 65.

The liability to repair a bridge by prescription applies to the approaches of the bridge, to a distance of 300 feet.

A CORPORATION were proved to be liable by prescription to repair a public bridge, but there was no evidence of actual repairs done by them or their predecessors to the approaches thereof within the time of living memory; such repairs having been done for a great number of years by commissioners appointed under a modern road act.

The Court held, that the corporation were also liable to repair the approaches to the bridge. A prescriptive liability to repair a public bridge, unexplained and unrestricted, includes the liability to repair the highway at the ends of it within the distance of 300 feet.

(c) OF THE INDICTMENT AND PROCEEDINGS RELATIVE THERETO.

REX v. SUTTON, T. T. 1835. K. B. 5 N. & M. 353.

An infant in ward is not liable to an indictment for non-repair of a bridge; but the guardians should be indicted.

INDICTMENT against the defendant for the non-repair of Kilham Bridge, in the county of Nottingham, which it was alleged he was liable to repair *ratione tenuræ*. It appeared that the defendant was the son and heir of Mr. Sutton, who died intestate, seised of the estate in respect of which the liability to repair was said to arise. At the time of the indictment being found, the defendant was an infant of the age of eleven years, in the course of education, and in the habit of passing his vacations there, and occasionally visiting his home at other times, his mother being his guardian, and resident upon the estate. It was objected, amongst other objections upon the validity of which the Court gave no opinion, that the occupier alone could be indicted for non-repair; and also, supposing the owner to be indictable, yet as the defendant was an infant, he could not be considered the owner, for the purpose of subjecting him to this indictment.

The Court held, that an infant, whose guardian is in the occupation of the estate and in receipt of the rents and profits, is not liable to the repair of a bridge *ratione tenuræ*, either as owner or occupier. The guardian in socage is such an owner and occupier as to be liable to the discharge of that and other obligations to which the land is subject.

REX v. INHABITANTS OF HENDON, E. T. 1833. K. B. 4 B. & Ad. 628.

An indictment against a parish

THIS was an indictment against the inhabitants of the parish of Hendon for not repairing a bridge called Decoy Bridge in that

* With respect to bridges to be built after the 20th March, 1836, the 5 & 6 Will. 4, c. 50, s. 21 (the general Highway Act), enacts, "That, if any bridge shall hereafter be built, which bridge shall be liable by law to be repaired by and at the expense of any county, or part of any county, then and in such case all highways leading to, passing over, and next adjoining to such bridge, shall be from time to time repaired by the parish, person, or body politic or corporate, or trustees of a turnpike road, who were by law, before the erection of the said bridge, bound to repair the said highways; provided, nevertheless, that nothing herein contained shall extend, or be construed to extend, to exonerate or discharge any county, or any part of any county, from repairing or keeping in repair the walls, banks, or fences of the raised causeways and raised approaches to any such bridge, or the land arches thereof."

parish. The indictment in various counts charged the defendants with having immemorially repaired, and being of right bound to repair. On motion in arrest of judgment—

Per Cur.—Rule refused. By 22 Hen. 8, c. 5, s. 2, it is recited, that, “In many parts of this realm it cannot be *known* and proved *what* hundred, riding, wapentake, city, borough, town, or *parish*, nor *what* person &c. ;” and it enacts, that in every *such* case the county shall repair. This shews that parishes *might* be liable before the passing of that statute.

REGINA v. LADY SUTTON, M. T. 1838. Q. B. 3 N. & P. 569;
S. C. 8 Ad. & E. 516.

ON an indictment for not repairing a bridge *ratione tenuræ*—

The Court held, that, in order to negative any such immemorial liability, a record of presentment in 18 Edw. 3, by the men of K. against the bishop of L. for the non-repairs of the bridge, on which the jury negatived the liability of the bishop, and went on to find that the bridge had been built about sixty years, and that they were wholly ignorant who of right was bound to repair it, the verdict being followed soon after by a grant of pontage to the men of K. for the same repairs, was an admissible document, as material to the issue, and good evidence to prove it.

REX v. WHITNEY, E. T. 1835. K. B. 4 N. & M. 594.

INDICTMENT for not repairing a bridge. It appeared that, upon an indictment for the non-repair of the same road in 1828, the defendants having first pleaded not guilty, afterwards withdrew their plea, and pleaded guilty. It was contended by the prosecutor that the record of the conviction in 1828 was conclusive evidence of liability on the part of the parish to repair the whole road, including the bridge, between the limits included in that indictment. Upon which, at the time, *Park, J.*, said, I think you have concluded yourselves by the indictment of 1828. On motion for a new trial—

Per Cur.—The learned Judge laid down no point of law, with regard to the question as to the judgment by default, when the learned Judge said—“I think you have *concluded* yourselves by the indictment of 1828.” He appears merely to have adverted to it as a strong fact. He did not say that, *in point of law*, it was *conclusive*.

for non-repair of a bridge, stating a liability by immemorial usage, is sufficient.

On an indictment for non-repair of a bridge *ratione tenuræ*, to negative the liability to repair, a presentment in 18 Edw. 3, in which the jury found against the liability to repair, is evidence;

but where a parish pleaded guilty to a former indictment:—Held, it was not conclusive evidence upon a subsequent indictment.

V. RELATIVE TO THE DESTROYING OR DAMAGING OF*.

* By 7 & 8 Geo. 4, c. 33, s. 13, it is enacted, “That if any person shall unlawfully and maliciously pull down or in anywise destroy any public bridge, or do any injury with intent, and so as thereby to render such bridge or any part thereof dangerous or impassable,” he shall be guilty of felony, and shall be punished by transportation for life, for not less than seven years, or imprisonment, with or without hard labour, for not more than four years.

Broker*.

See *tit. Bills and Notes—Bill Broker—Principal and Agent.*

COPE v. ROWLANDS, M. T. 1836. Ex. 2 M. & W. 142.

In the city of London a stock-broker must be licensed by the mayor, &c.

ASSUMPSIT for work and labour as defendant's agent, and for commission due to the plaintiff from the defendant. Plea, that the work and labour was alone performed and bestowed by the plaintiff within the city of London, as a broker, to wit, as a stock-broker, in and about the purchasing and selling for and on account of the defendant, and bargaining for and on account of the defendant for interests and shares in public stocks, &c.; and that the commission in the declaration mentioned is commission claimed by the plaintiff in respect of such work and labour as a broker; and that the plaintiff was not, at the time of performing the work, a broker duly licensed, authorized, or empowered to act or practise as a broker in the premises within the city of London. Replication, *de injuriâ*. The defendant having recovered a verdict on this plea, motion was made for judgment *non obstante veredicto*.

Sed per Cur.—The plea was, that the work and labour in respect of which the action was brought was performed by the plaintiff as a stock-broker in London, and that he was not licensed, authorized, and empowered to act as a broker by the Court of Mayor and Aldermen, pursuant to the statute: we are of opinion, that the plea is good in substance; and, consequently, the rule must be discharged.

See *Clark v. Powell*, 1 N. & M. 492; *Baring v. Corrie*, 2 B. & A. 137.

CLARK v. CAPP, H. T. 1824. N. P. 1 Car. & P. 199.

In debt for penalties against a broker, to make his card evidence of being such, notice to produce must be given.

THE defendant not being licensed as a broker in the city of London, an action of debt was brought for the penalty. To establish that he had acted as a broker, a witness produced one of the cards of the defendant and his partner—"Capp & King, Ship Brokers, &c."

Abbott, C. J.—This card cannot be given in evidence, unless it was received from the defendant himself. The proper way is, to give the defendant notice to produce his cards, and then to prove one as a copy, or give parol evidence of the contents. Nonsuit.

* The usage is, that, when a broker has introduced the captain of a ship and a merchant together, and they, by his means, enter into some negotiation as to the intended voyage, the broker is entitled to commission if a charter-party be effected between them for that voyage, even though they may employ another broker to prepare the charter-party, or may write the charter-party themselves.

If a broker be authorized by both parties, and, acting as the agent of each, communicates to the merchant what the ship-owner charges, and also communicates to the ship-owner what the merchant will give, and he names the ship and the parties so as to identify the transaction, and a charter-party be ultimately effected for that voyage, this broker is entitled to his commission; but if he does not mention the names so as to identify the transaction, he does not get his commission to the exclusion of another broker who afterwards introduces the parties personally to each other.

A., a broker, introduced a merchant and a ship-owner together to treat for a charter-party: they finally made the charter-party through B., another broker. In an action by A. for his commission, the particulars of demand were—"For commission due to the plaintiff for procuring a charter for a vessel called the W." &c.:—Held sufficient. (*Burnell v. Bouch*, T. T. 1840, N. P., 9 C. & P. 620).

Brothel. See tit. *Bawdy House*.

Bubble Act. The 6 Geo. 1, c. 28, part, repealed, and new Enactments by 6 Geo. 4, c. 91.

Building Act. See tit. *Party Wall*.

Burgess. See tit. *Corporation*.

Burglary*.

See 4 *Peters. Abr.* 735.

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 - II. OF THE ENTRY, p. 445.
 - III. RELATIVE TO THE TIME AT WHICH THE OFFENCE MAY BE COMMITTED, p. 446.
 - IV. RELATIVE TO THE PLACE IN WHICH THE OFFENCE MAY BE COMMITTED, p. 446.
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 - VIII. RELATIVE TO THE PUNISHMENT, p. 450.
 - IX. RELATIVE TO THE REWARD GIVEN TO PERSONS APPREHENDING BURGLARS, p. 450.

* Burglary is an offence at common law; (Leg. Edm. c. 6); and a burglar is defined by Sir *Edward Coke*, 3 Inst. 63, to be one "that in the night breaketh and entereth into a mansion-house of another of intent to kill some reasonable creature, or to commit some other felony within the same, whether his felonious intent be executed or not." This offence was called by the Saxons *husbrec*, (Leg. Cnuti, c. 61), and was considered as inexpiable, and therefore punishable with death. By our ancient law, it was called *hamesecken*. (4 Bl. Com. 223). The word "burglary" is derived from the Saxon word "bureg," or "burh," meaning a town or city, and the Norman French word "laroun," a robber. It appears, (3 Inst. 65), that originally the circumstance of *time*, which is now essential to the offence, was not considered as material; and the malignity of the crime was supposed to consist merely in the invasion of the right of habitation. The editor of Bacon's *Abr. Evidence*, (Ed. 1807), states, that he was unable to discover at what particular period *time* was first deemed essential to the offence; but that it must have been so settled before the reign of Edward VI., as in the fourth year of that king it is expressly laid down that it shall not be adjudged burglary,

I. OF THE BREAKING*.

"*Nisi on le infreinder del meason est per noctem*;" (Bro. tit. Corone, pl. 185); and that, two years before, "per noctem" is introduced, (Id. pl. 180), as of course in the mention of the offence. (1 Bac. Ab. Burglary, 539). It must be, according to *Sir Edward Coke's* definition, in a mansion-house; and therefore to account for the reason why breaking open a church is burglary, as it undoubtedly is, he quaintly observes "that it is domus mansionalis Dei." (3 Inst. 64). But it does not seem absolutely necessary that it should in all cases be a mansion-house, for it may also be committed by breaking the gates or walls of a town in the night; (Spelm. Gloss. tit. Burglary; 1 Hawk. P. C. 103); though that, perhaps, *Sir Edward Coke* would have called the mansion-house of the garrison or corporation. *Spelman* defines burglary to be "*Nocturna diruptio alicujus habitaculi, vel ecclesiæ, etiam murorum portarumve burgi, ad feloniam perpetranda*." And, therefore, we may safely conclude, that the requisite of its being domus mansionalis is only in the burglary of a private house. No distant barn, warehouse, or the like, are under the same privileges, nor looked upon as a man's castle of defence; nor is a breaking open of houses wherein no man resides, and which, therefore, for the time being are not mansion-houses, attended with the same circumstances of midnight terror. (4 Bl. Com. 224).

*It is a question for the jury whether the prisoner has been guilty of any act of breaking; but whether that act amounts to a burglarious breaking, is an unmixed question of law. (See Fort. 107; 1 And. 114; Saville, 59; 1 Hale, P. C. 551; 3 Inst. 64). It is not every entrance into a house, in the nature of a mere trespass which will be sufficient, or satisfy the language of an indictment—*felonice et burglariter fregit*. (3 Inst. 64; 1 Hawk. P. C., c. 38, s. 4; 1 Hale, P. C. 551—2). As, if a man enter into a house by a door or window which he finds open, or through a hole which was made there before, and steal goods or draw goods out of a house through such door, window, or hole, he will not be guilty of burglary; for, if a man leaves his doors or windows open, it is his own folly and negligence. (4 Blac. Com. 226; 1 Hale, 551; 3 Inst. 64). But a sufficient breaking is effected by making a hole in the wall, by forcing open the door, by pulling back, picking, or opening the lock with a false key, by breaking the window, by taking a pane of glass out of the window, (1 Carr. 300); by drawing or bending the nails or other fastening, or by pulling back the leaf of a window with an instrument; and even the drawing or lifting up the latch where the door is not otherwise fastened, the turning the key where the door is locked on the inside, or the unloosing any other fastening which the owner has provided will amount to a breaking. (1 Hale, P. C. 552; 3 Inst. 64; 1 Hawk. P. C., c. 38, s. 6; 2 East, P. C. 487). So, if a thief enter by the chimney, it is a breaking, for it is as much closed as the nature of things will permit. (1 Hawk. P. C., c. 38, s. 4; 4 Blac. Com. 226). Where an entry was effected by taking out the glass from a door it was holden to be burglary. (*Rex v. Smith*, R. & R. 417). And where the defendant pulled down the sash of a window which had no fastening, and was only kept in its place by the pulley-weight, it was holden to be burglary, although there was an outer shutter which was not put to. (*Rex v. Haines*, R. & R. 451). So, where he raised a sash-window which was shut down close, but not fastened, though it had a sash which might have been fastened. (*Rex v. Hyams*, 7 C. & P. 441). And where a window opening upon hinges and fastened with wedges, but so that by pushing against it it could be opened, it was holden to be burglary. (*Rex v. Hall*, R. & R. 355). So, where a party thrust his arm through the broken pane of a window, and in so doing broke some more of the pane, and thus got at and removed the fastening of the window, and opened it, it was holden to be a sufficient breaking. (*Rex v. Robinson*, 1 Mood. C. C. 327). And, where the party broke a pane of glass of a window, and put his hand in for the purpose of opening the shutter, though he did not succeed in doing so. (*Rex v. Perkes*, 1 C. & P. 300). Where a glass window had been cut a month before, but every part of the glass remained in its place till the prisoner pushed it in, it was held to be a sufficient breaking. (*Rex v. Bird*, 9 C. & P. 44). In *Rex v. Callan*, (R. & R. 157), the prisoner entered the premises by lifting up a heavy flap of a cellar, which was not bolted; and, upon a question reserved, whether this was a sufficient breaking to constitute burglary, the Judges were equally divided. In *Rex v. Laurence*, (4 C. & P. 231), *Bolland*, B., held it not a sufficient breaking; but, in *Rex v. Russell*, (1 Mood. C. C.), which was a later case, it was held that it did amount to a sufficient breaking. If a window is partly, open, but not sufficiently to admit a person, the raising of it so as to admit a person is not a breaking of the house; (*Rex v. Smith*, 1 Mood. C. C. 178); and where

II. THE ENTRY*.

there was an aperture in a cellar window to admit light, through which the entry is made in the night, it is not sufficient. (*Rex v. Lewis*, 2 C. & P. 628). The same where a similar hole was left in the roof. (*Rex v. Spriggs*, 1 Moo. & R. 537).

The breaking must be of some part of the house; and therefore where the defendant opened an area-gate with a skeleton key, and thence passed through an open door into the kitchen, it was holden not to be a breaking; there being a free passage from the area to the house in the hours of sleep. (*Rex v. Davis*, R. & R. 322). So, it was held, that the breaking of an outward gate, part of the outward fence of the curtilage of a dwelling-house, and which opened, not into any building, but into the yard only, was not a breaking of the dwelling-house. (*Rex v. Bennett*, R. & R. 289). Where a shutter-box partly projected from a house, and adjoined the side of the shop-window, which side was protected by wooden panneling, lined with iron, it was held, that the breaking and entering the shutter-box did not constitute burglary. (*Rex v. Paine and Cooper*, 7 C. & P. 135).

Though it was said to be law, that the entering into the house of a person, without breaking it, with an intent to commit some felony, and afterwards breaking the house in the night-time to get out, was burglary; yet, the doctrine was questioned by great authority; (Lord *Holt*, C. J., and *Trevor*, J., 2 East, P. C. c. 15, s. 6, p. 490); and it was thought expedient to remove the doubt by legislative enactment. This was first done by the statute, 12 Ann., stat. 1, c. 7, s. 3, now repealed by the 7 & 8 G. 4, c. 27; and the statute 7 & 8 G. 4, c. 29, s. 11, contains the following enactment upon the subject, namely:—"It is hereby declared, that if any person shall enter the dwelling-house of another with intent to commit felony, or being in such dwelling-house shall commit any felony, and shall in either case break out of the said dwelling-house in the night time, such person shall be deemed guilty of burglary." An indictment for burglary stated in one count, that the prisoner "did break to get out," and in another, that he "did break and get out;" and it was held insufficient; the words of the statute being "break out." (*Rex v. Compton*, 7 C. & P. 139).

If a lodger commits a larceny in the house, and in the night lifts a latch to get out of the house with the stolen property, it is a burglarious breaking out. (*Rex v. Wheeldon*, 8 C. & P. 747).

* To constitute burglary, an entry with any part of the body, as a hand, is sufficient, or a finger; (1 R. & R., C. C. 499); or foot, or with any instrument introduced for the purpose of committing a felony. (1 Hale, P. C. 555; 3 Inst. 64; 1 Hawk. P. C., c. 38, s. 11; 1 And. 115; 4 Blac. Com. 227). As if a thief breaks a window of a house in the night-time, with an intent to steal, and puts in a hook, (1 Hale, P. C. 555; 3 Inst. 64); or an infant, (*Ibid*), to reach out the goods; or puts a pistol in at the window with intent to kill; this is a burglary, though the hand of the culprit be not within the window. (1 Hale, P. C. 555; 3 Inst. 64). And where thieves came by night to rob a house, the owner went out and struck one of them, another made a pass with a sword at persons he saw in the entry, and in so doing his hand was over the threshold; this was adjudged burglary. (2 East, P. C. 490). Though where a thief broke a hole in a house, intending to rob the owner, but had not otherwise entered when the owner from fear threw out his money to him, and he went off with it, has been deemed not to amount to burglary. (1 Hale, P. C. 555). So, where thieves perforated a door with a centre-bit, and part of the chips were found in the inside of the house, by which it was apparent that the end of the centre-bit had penetrated into the house, yet as the instrument had not been introduced for the purpose of taking the property, or committing any other felony, it was decided that this entry was not sufficient to constitute burglary. (*Rex v. Hughes*, 2 East, P. C. 491). Where, therefore, the defendant threw up a window, and introduced a crow-bar to force the shutters, which were three inches from the window, but no part of his hand was within the window, this was holden not to be an entry, although the jury found that the defendant did this with intent to steal. (*Rex v. Rust*, 1 Mood. C. C. 183). If the defendant introduce his hand through a pane of glass broken by him, between the outer windows and an inner shutter, for the purpose of undoing the window-latch, it is a sufficient entry. (*Rex v. Bailey*, R. & R. 341). So, an entry down a chimney is a sufficient entry into the house, for the chimney is part of the house. (*Rex v. Brice*, R. & R. 450). But an entry through a hole in the roof, left for the purpose of admitting light, is not a sufficient entry to constitute burglary; for a chimney is a necessary opening and needs protection; whereas, if a man choose to leave a hole in the wall or roof of his own house, instead of a fastened window, he must take the consequences. (*Rex v. Spriggs*, 1 M. & Rob. 357).

III. RELATIVE TO THE TIME AT WHICH THE OFFENCE MAY BE COMMITTED*.

IV. RELATIVE TO THE PLACE IN WHICH THE OFFENCE MAY BE COMMITTED.†

* The offence must be committed in the night. Anciently the day was considered to begin from sun rising, and to end at sun setting; but it is ultimately agreed, that, if there was sufficient remains of daylight to discern the features of a man's face, no breaking could be burglarious; (3 Inst. 63; 1 Hale, P. C. 550; 2 Leach, C. L. 710); though this did not extend to moonlight nights; for, as observed by Blackstone, J., (4 Com. 224), "the malignity of the offence does not so properly arise from its being done in the dark as in the dead of night, when all the creation, except beasts of prey, are at rest, when sleep has disarmed the owner and rendered his castle defenceless." (1 Hawk. P. C., c. 38, s. 2). If the breaking and entering were committed during twilight, then, if there was not daylight or crepusculum enough begun or left to discern a man's face withal, it was burglary; otherwise, not. (3 Inst. 63; 1 Hale, P. C. 550; 1 Hawk. P. C., c. 38, s. 2; 4 Blac. Com. 224). By 1 Vict. c. 86, s. 4, it is now provided, "That, so far as the same is essential to the offence of burglary, the night shall be considered and is hereby declared to commence at nine of the clock in the evening of each day, and to conclude at six of the clock in the morning of the next succeeding day."

A breaking one night and an entry the next is sufficient. (*Rex v. Jordan*, 7 C. & P. 432; 1 Hale, 551). But if the breaking be in the day and the entering in the night; or, the breaking in the night and the entering in the day, it is no burglary. (1 Hale, 551).

† Lord Coke, (3 Inst. 64), has said, "every house for the dwelling and habitation of man is taken to be a mansion-house, wherein burglary may be committed." The term "dwelling-house" comprehends all buildings within the curtilage, or enclosure. (See 1 Hale, P. C., 358, 559; 1 Hawk. P. C. c. 38, s. 12; East, P. C. 492). The house must be a place of actual residence; therefore burglary cannot be committed in a house under repair, which is not inhabited by the owner, although part of his property be there deposited. (*Rex v. Lyons*, 1 Leach, C. L. 185; S. C. 2 East, P. C. 497). Nor can it be committed in a newly built house, even though the builder resides therein for its protection. (*Rex v. Fuller*, 1 Leach, C. L. 186; S. C. 1 East, P. C. 498). And the same rule obtains where the prosecutor employs persons not in the capacity of servants to take care of his property, preparatory to his removal; (*Rex v. Harris*, 2 Leach, C. L. 701; S. C. 2 East, P. C. 498); and though he has used it for his meals, and all the purposes of his business. (*Rex v. Martin*, 1 R. & R. C. C. 108). So, where the owner of a house has no intention of residing therein, and merely sends a servant to sleep there, to protect his goods, &c., it cannot be deemed a dwelling-house; (*Rex v. Davies and Another*, 2 Leach, 876; S. C. 2 East, P. C. 499); because either the owner, or his family or servants, must sleep therein; (*Rex v. Thompson*, 2 Leach, C. L. 771; S. C. 2 East, P. C. 498); unless the absence be occasional or temporary, with an intention on the part of the owner of the house to return. (*Nutbrown's case*, 2 East, P. C. 496; S. C. Fost. 76). Therefore, if A. have two dwelling-houses, and upon occasion he and all his family be sometimes at one, and sometimes at the other, an entry into one of them in the night-time, in the absence of his family, will be burglary; (1 Hale, P. C. 556); as where he is absent for a month, though no person be left therein. (*Murray and Harris's case*, 2 East, P. C. 496). A permanent building, used and slept in only for a short time for the purpose of a fair, may be treated as the dwelling-house of the person so occupying it in an indictment for burglary, though unoccupied during the rest of the year. (*Rex v. Smith*, 1 Mood. & Rob. 256). And it seems that if a person die in his house, and his executors put servants in it, a burglary may be committed therein. (*Jones v. Longman's case*, cited 2 East, P. C. 499). The owner may occupy by any person who is deemed part of his family. (*Farre's case*, Kel. 43-4).

"If a general rule," observes Mr. East (2 East, P. C. 499, 500), "by which to ascertain the ownership, might be comprised with sufficient discrimination in a small compass, I should say generally, that where the legal title to the whole mansion remains in the same person, there, if he inhabit either by himself, his family, or servants, the indictment must lay the offence to have been committed against his mansion." (See also 2 East, P. C. 501-2; 2 And.).

Where a married woman lived apart from her husband upon an income arising from property vested in trustees for her separate use, it was decided that a house which she had hired to reside in was properly described as her husband's dwelling-house, though she paid the rent out of her separate property, and the husband had never been in it. (*Rex v. French*, 1 R. & R. C. C. 498; *Rex v. Smyth*, 5 C. & P. 201). And in *Rex v. Wilford* (1 R. & R. C. C. 517), it was holden that the house of a husband, in which he allowed his wife to live separate from him, might be described as the house of the husband, though the wife lived there in adultery with another man, who paid the housekeeping expenses, and though the husband suspected a criminal intercourse between his wife and the other man when he allowed her to live separate. Where the prosecutor's dwelling-house and the warehouse broken into were within an inclosed yard, but between them was another dwelling-house opening into the yard, which he let to a servant with certain easements in the yard, the two dwelling-houses having been formerly one, it was held that the warehouse having before the division formed part of the prosecutor's dwelling-house did so afterwards, and that the conviction on an indictment charging a burglary in the prosecutor's dwelling-house was right. (*Rex v. Walters*, 1 Ry. & M. C. C. 13). In *Rex v. Jobling*, (1 R. & R. C. C. 525) where the owner of a cottage let one of his workmen, with his family, live in the cottage free of rent and taxes, and he lived there principally, if not wholly, for his own benefit, it was holden that it might be described as the workman's dwelling-house. Though, in *Rex v. George Jarvis and Benjamin Walker* (1 Ry. & M. C. C. 7), it was decided, on an indictment for burglary, that if a servant lives in a house of his master's, at a yearly rent, the house cannot be described as the master's house, though it is on the premises where the master's business is carried on, and although the servant has it because of his service. So, though a servant live rent-free for the purpose of his service in a house provided for that purpose, yet if he has the exclusive possession, and it is not parcel of any premises which his master occupies, it may be described as the house of the servant; (*Rex v. Rees*, 7 C. & P. 568); especially if the house belongs not to his master, but to some person paramount to his master; as in the case of a toll-collector's house, occupied by the servant of the lessee of the tolls, for the purpose of collecting the tolls. (*Rex v. Camfield*, 1 Ry. & M. C. C. 42; but see 1 R. & R. C. C. 185). But where a prisoner was indicted for a burglary in the dwelling-house of J. B., and it appeared that J. B. worked for W., who did carpenter's work for a public company, and put J. B. into the house, which belonged to the company, to take care of it and some mills adjoining; and there was no difference in the wages of J. B. after and before he went to live in the house; *Gaselee, J.*, and *Vaughan, J.*, intimated an opinion that the ownership was not rightly laid. (*Rex v. Rawlins*, 7 C. & P. 150). Where A. was charged with breaking into the house of K., and stealing the goods of M., it was proved by M. that K. had taken the house, and that M., who lived on his property, carried on the trade of a silversmith for the benefit of K. and his family, having no share in the profits or salary. M. stated that he had authority to sell any part of the stock, and might take money from the till, but he should tell K. of it; and that he sometimes bought goods for the shop, and sometimes K. did it. It was held that M. was a bailee, and that the goods in the shop ought properly to be laid as his property. (*Rex v. Bird*, 9 C. & P. 44).

By the 7 & 8 Geo. 4, c. 29, s. 3, it is provided, "That no building, although within the same curtilage with the dwelling-house, and occupied therewith, shall be deemed to be part of such dwelling-house, for the purpose of burglary, or for any of the purposes aforesaid, unless there shall be a communication between such building and dwelling-house, either immediate, or by means of a covered and inclosed passage leading from the one to the other." In *Rex v. Burrowes* (1 Mood. C. C. 274), it was held by a majority of the Judges, seven to five, that a wash-house under the chambers and same roof, and occupied with the dwelling-house, was part of the dwelling-house within this section. By section 14 of the same statute it is enacted, "That if any person shall break and enter any building, and steal therein any chattel, money, or valuable security, such building being within the curtilage of a dwelling-house, and occupied therewith, but not being part thereof, according to the provision hereinbefore mentioned, every such offender being convicted thereof, either upon an indictment for the same offence, or upon an indictment for burglary, housebreaking, or stealing to the value of five pounds in a dwelling-house, containing a separate count for such offence, shall be liable, at the discretion of the Court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years; and if a male, to be once, twice, or thrice publicly or privately whipped (if the Court shall so think

V. RELATIVE TO THE FELONIOUS INTENTION OF THE PRISONER.*

VI. RELATIVE TO THE LIABILITY OF AIDERS AND ABETTORS†.

VII. RELATIVE TO THE INDICTMENT‡.

fit), in addition to such imprisonment." By 1 Vict. c. 90, ss. 2, 3, the punishment is altered to transportation for any period not exceeding fifteen or less than ten years, or imprisonment not exceeding three years, with or without hard labour and solitary confinement, not exceeding three months in any year or one month at a time. By s. 15, "That if any person shall break and enter any shop, warehouse, or counting-house, and steal therein any chattel, money, or valuable security, every such offender being convicted thereof shall be liable to any of the punishments which the Court may award, as hereinbefore last mentioned." And by s. 61, "That in the case of every felony punishable under this act, every principal in the second degree, and every accessory before the fact, shall be punishable with death or otherwise, in the same manner as the principal in the first degree is by this act punishable; and every accessory after the fact to any felony punishable under this act, (except only a receiver of stolen property), shall on conviction be liable to be imprisoned for any term not exceeding two years."

* To constitute burglary, there must be an intention to commit some felony; therefore, an intention to commit a mere trespass is not burglary. (*Dobb's case*, 2 East, P. C. 511). For a breaking and entry, though both nocturnal and violent, will not be esteemed burglary, unless the party intended at the time to commit a felony; (2 Leach, C. L. 717); even though it is possible that death might ensue, there being no original felonious intention. (3 Inst. 65; 1 Hale, P. C. 561). As where a servant, entrusted by his master to sell goods, receives the money, conceals it in the house, and after his dismissal breaks into the house and steals it, the entry is not burglarious, because there was no felony in the original taking. (*Rex v. Dingley*, cited as *Baseley's case*, 2 Leach, C. L. 840; S. C. Show. 53). And where prisoners were proved to have broken open a house in the night-time to recover goods seized for want of a legal permit, for the use of the person from whom they were taken, an indictment for burglary with intent to steal was holden not to be supported. (*Rex v. Knight*, 2 East, P. C. 510).

† If several persons come in the night to commit a burglary, and one of them break and enter, the rest standing to watch at a distance, this will be burglary in all, and they will be all deemed principals. (1 Hale, P. C. 555). A room-door was latched, and one person lifted the latch and entered the room and concealed himself for the purpose of committing a robbery there, which he afterwards accomplished. Two other persons were present with him at the time he lifted the latch, for the purpose of assisting him to enter, and screened him from observation by opening an umbrella. It was held, that the two were, in law, parties to the breaking and entering, and were answerable for the robbery which took place afterwards, though they were not near the spot at the time when it was perpetrated. In burglary, where the breaking is one night and the entry the night after, a person present at the breaking, though not present at the entering, is, in law, guilty of the whole offence. (*Rex v. Jordan and Others*, 7 C. & P. 432).

‡ The words, *broke and entered* burglariously and feloniously, must be inserted in the indictment. (1 Hale, P. C. 550; 4 Co. 39, 40). An indictment for breaking out of a house stated that the prisoner "did break to get out," in one count, and "did break and get out," in another; and both counts were held insufficient, as the 7 & 8 Geo. 4, c. 29, s. 11, uses the words "break out."

The indictment must charge the breaking and entering to have taken place in the night, (1 Hale, P. C. 549), as well as the day and the hour, (*Waddington's case*, 2 East, P. C. 513); and the hour should, though after twelve o'clock at night, be stated to be in the night of the preceding day. (1 Chit. Burn's Justice, 545). By 7 Geo. 4, c. 64, s. 20, it is provided, "That no judgment upon any indictment or information for any felony or misdemeanour, whether after verdict or outlawry, or by confession, or default, or otherwise, shall be stayed or reversed, for omitting to state the time at which the offence was committed, in any case where time is not of the essence of the offence, nor for stating the time imperfectly, nor for stating the offence to have been committed on a day subsequent to the finding of the indictment, or exhibiting the information, or on an impossible day, or on a day that never happened." It must state the offence to have been committed in a dwelling-house; therefore, if the place is stated as a house generally, it will be

defective. (1 Hale, P. C. 550). Where a church is broken into, it seems proper to describe it as the church of the parish to which it belongs. (1 Hale, P. C. 556). And where an outhouse or stabling adjoining the mansion, is broken open, it must be laid generally as part of the dwelling-house. (1 Leach, C. L. 144; 2 East, P. C. 512). The local situation must also correspond with the real fact. If it be not expressly stated where the dwelling-house is situated, it shall be taken to be situated at the place named in the indictment, by way of special venue. (See *Rex v. Napper*, R. & M. C. C. 44). And if, two parishes having been named, the house is stated to be "at the parish aforesaid," the last parish shall be intended. (*Rex v. Richards*, 1 M. & Rob. 177). Where it appeared that the dwelling-house was in the parish of A., and an outhouse connected and occupied with it, in the parish of B., and a burglary was committed in the outhouse; one of the questions reserved for the opinion of the Judges was, whether the dwelling-house was properly described in the indictment, as being in the parish of B.; but the Judges gave no opinion upon this point, having decided the case upon another ground. (*Rex v. William Bennett and Another*, R. & R. 289).

An indictment for burglary in a dwelling-house, (*Rex v. White*, 1 Leach, C. L. 252; S. C. 2 East, P. C. 513.—S. P. *Woodward's case*, 1 Leach, C. L. 253, n.), or stealing goods therein, must accurately state the name of the owner. (*Rex v. Jenks*, 2 Leach, C. L. 774; S. C. 2 East, P. C. 514). By the 7 Geo. 4, c. 64, s. 14, it is provided, "That, in any indictment or information for any felony or misdemeanour, wherein it shall be requisite to state the ownership of any property whatsoever, whether real or personal, which shall belong to or be in the possession of more than one person, whether such persons be partners in trade, joint tenants, parceners, or tenants in common, it shall be sufficient to name one of such persons, and to state such property to belong to the person so named, and another or others, as the case may be; and whenever, in any indictment or information for any felony or misdemeanour, it shall be necessary to mention, for any purpose whatsoever, any partners, joint-tenants, parceners, or tenants in common, it shall be sufficient to describe them in the manner aforesaid; and this provision shall be construed to extend to all joint-stock companies and trustees."

The indictment cannot be sustained unless there be an averment of a felonious intention, or the actual commission of a substantive felony. (1 Hale, P. C. 559; 2 Leach, C. L. 1717). And the intent must be correctly stated: for if it be charged that the defendant intended to commit one species of felony, and it be proved that he designed another, the indictment will not be sustainable; (1 Hale, P. C. 561); but if a felony has been actually committed, an averment of the intent only will not be vicious. (1 Hale, P. C. 560). In general, where any doubt exists as to what specific felony was designed, the intention should be laid differently in distinct counts, in order to correspond with the evidence. (2 East, P. C. 515).

If bank notes or other valuable securities are stolen, the indictment should conclude "against the form of the statute;" for although this is not necessary as to the burglary, yet, if that part of the charge fails, such a conclusion would be deemed necessary, in order to obtain a conviction of the larceny. (*Rex v. Pearson*, 5 C. & P. 121). Two poachers went to the house of a gamekeeper who had taken a dog from them, and, believing him to be out of the way, broke the door at night and entered: being indicted for this as a burglary, it appearing that their intention was to rescue the dog, and not to commit a felony, *Vaughan*, B., directed an acquittal. (*Anon.*, Matth. Dig. C. L. 48). If a poacher take a gun by force from a gamekeeper, under the impression that it may be used against him, it is not felony, though he state afterwards that he will sell the gun, and it be not subsequently heard of. (*Rex v. Holloway*, 5 C. & P. 524).

Under an indictment for burglary and stealing goods, on failing to prove the burglary, the prosecutor cannot be permitted to prove on the same indictment that a larceny was committed at any time antecedent to the time at which the burglary was laid to have been committed. (*Rex v. Vandercomb and Another*, 2 Leach, C. L. 708; S. C. 1 East, P. C. 519). If, in an indictment for burglary, the actual felony be laid to constitute the burglary, and not the intention to commit a felony, an acquittal of the burglary includes in it the charge of stealing in the dwelling-house. (*Rex v. Comer*, 1 Leach, C. L. 36). But a party indicted for burglary, and stealing the goods of a particular person, and acquitted, may afterwards be indicted for the same burglary and stealing the goods of a different person. (*Vandercomb and Another's case*, 2 Leach, C. L. 716; S. C. 2 East, P. C. 519). Upon an indictment for burglary, the prisoner may be acquitted of the

VIII. RELATIVE TO THE PUNISHMENT*.

IX. RELATIVE TO THE REWARD GIVEN TO PERSONS APPREHENDING BURGLARS†.

burglary, and found guilty of stealing in the dwelling-house to the amount of 40s., under the 12 Ann. c. 7. (*Rex v. Withal and Another*, 1 Leach. C. L. 88; S. C. 2 East, P. C. 515). Where the principal had been acquitted of the capital charge, the accessory may be convicted of receiving the goods, and transported for fourteen years. (*Rex v. Gadsby*, cited 1 Burn. Just. 407).

On an indictment for burglary, by breaking into a house and stealing to the value of 5*l.* or more, the prisoner may be convicted of burglary or of house-breaking, under 7 & 8 Geo. 4, c. 29, s. 12, or of stealing in a dwelling-house to the value of 5*l.* (*Rex v. Compton*, 3 C. & P. 418). An indictment on 7 Will. 4 & 1 Vict. c. 86, s. 2, for the capital offence of burglary and striking, charged the striking D. *James*, in the house of S. W. The burglary was proved as laid, but the person proved to have been struck was D. *Jones*. It was held that the prisoner must be acquitted of the capital charge, and convicted of burglary only. (*Reg. v. Parfitt*, 8 C. & P. 785).

* Burglary was, at common law, a felony within the benefit of clergy; (3 Inst. 63, 65; 4 Black. Com. 228); but a higher punishment was imposed by the provisions of several statutes now repealed. The 7 & 8 Geo. 4, c. 28, s. 6, abolished benefit of clergy in all cases. The 7 & 8 Geo. 4, c. 29, s. 11, makes burglary a capital offence, by enacting, "that every person convicted of burglary shall suffer death as a felon." With respect to accessories, that statute also enacts, "That, in the case of every felony punishable under this act, every principal in the second degree, and every accessory before the fact, shall be punishable with death, or otherwise in the same manner as the principal in the first degree is by this act punishable; and every accessory after the fact to any felony punishable under this act (except only a receiver of stolen property) shall, on conviction, be liable to be imprisoned for any term not exceeding two years." The trial of accessories is now regulated by the stat. 7 Geo. 4, c. 64, ss. 9, 10, 11, by which an accessory before the fact may be tried as such for a substantive felony, whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice. It provides also, that such accessories, and also accessories after the fact, may be tried by any court which has jurisdiction to try the principal felon, although the offence be committed on the seas, or abroad; and that, if the offence be committed in different counties, the accessory may be tried in either. And it also enacts, that the accessory may be prosecuted after a conviction of the principal, although the principal be not attained.

By the 7 Will. 4 & 1 Vict. c. 86, s. 3, it is provided, "That whosoever shall be convicted of the crime of burglary shall be liable, at the discretion of the Court, to be transported beyond the seas for the term of the natural life of such offender, or for any term not less than ten years, or to be imprisoned for any term not exceeding three years."

By sect. 6, "That, in the case of every felony punishable under this act, every principal in the second degree, and every accessory before the fact, shall be punishable with death, or otherwise in the same manner as the principal in the first degree is by this act punishable; and every accessory after the fact to any felony punishable under this act (except only a receiver of stolen property) shall, on conviction, be liable to be imprisoned for any term not exceeding two years."

And, by sect. 7, "That, where any person shall be convicted of any offence punishable under this act, for which imprisonment may be awarded, it shall be lawful for the Court to sentence the offender to be imprisoned, or to be imprisoned and kept to hard labour, in the common gaol or house of correction, and also to direct that the offender shall be kept in solitary confinement for any portion or portions of such imprisonment, or of such imprisonment with hard labour, not exceeding one month at any one time, and not exceeding three months in any one year, as to the Court in its discretion shall seem meet."

† The 5 Ann. c. 31, s. 1, which gave a reward of 40*l.* to the person apprehending a burglar, to be paid within a month after conviction, was repealed by the 58 Geo. 3, c. 58, s. 1. The 7 Geo. 4, c. 64, s. 28, authorizes the Court, in its discretion, to direct compensation to be made to persons active in the apprehension of burglars and other offenders.

Burial.

Ex parte BLACKMORE, T. T. 1830. K. B. 1 B. & Ad. 122.

MOTION for a mandamus to be directed to the Rev. Mr. St. Aubyn, rector of Stoke Daucereel in Devonshire, commanding him to bury a son of Mr. Blackmore, a parishioner, in a vault in the parish churchyard. The following appeared to be the facts:—In the year 1805, Mr. Blackmore, by leave of the churchwardens and rector, caused a vault to be built for himself and family in the parish churchyard; and the corpses of several members of his family had since been buried there. In November, 1829, a son of Mr. Blackmore having died, he applied to Mr. St. Aubyn, the rector, to allow the vault to be opened. That gentleman did not object to the vault as an inconvenient or improper place for the burial, but claimed a fee of 2*l.* 12*s.* 6*d.* for opening the vault. He said he would allow the corpse to be buried in the churchyard without the payment of such fee.

Per Cur.—We cannot grant a mandamus to the rector to bury a corpse in a particular part of the churchyard. He has a right to exercise a discretion on that subject. If he had refused *altogether* to bury the corpse, we would have compelled him.

REX *v.* CHEERE, M. T. 1825. K. B. 4 B. & C. 902; S. C. 6 D. & R. 461.

THIS indictment charged the defendant with having unlawfully, wilfully, and contemptuously hindered and obstructed N. C., clerk, in reading the order for the burial of the dead and in interring the corpse of one J. D., and with having unlawfully, wilfully, and contemptuously, by threats and menaces, prevented and hindered the burial of that corpse, according to the rites and ceremonies of the Established Church. Rule to arrest the judgment: first, because the indictment did not aver that the clergyman was in the execution of his office; and next, that the indictment was too general in charging the defendant with having threatened and menaced the clergyman, and that the particular acts, amounting to threat and menace, ought to have been specified.

The Court were clearly of opinion, that the indictment was bad for want of certainty. To say that the defendant, by threats and menaces, hindered and prevented the burial, was not sufficient. It should have appeared how he threatened and how he menaced. The saying, that the defendant, “unlawfully,” &c., acted, was not sufficient: it should have been shewn how it was unlawful. The case in *Strange*, 699, was a strong authority on this point; but, even in that

At common law there is no means to compel a rector to bury a corpse in a vault or particular part of a churchyard, as he has a discretionary power*.

An indictment for obstructing the burial of a person, stating that the defendant “unlawfully, &c, by threats and menaces, prevented and hindered the burial,” is too general.

* Where the child of a dissenter had been baptized, although not according to the form of the Church of England:—Held, that the minister of the parish could not legally refuse it burial. (*Kemp v. Wilkes*, (Archers), 3 Phil. 264). The churchwardens cannot refuse to admit iron coffins in burial, but they have a right to demand a higher fee, to indemnify the parish against the charge of procuring additional cemeteries which may be rendered necessary by their longer durability. The Court, with this view, signed a table of fees. (*Gilbert v. Buzzard*, (Cons.), 3 Phil. 335).

But the mode of burial being a matter purely for the Ecclesiastical Court, the Court of K. B. refused to grant a mandamus for the burial of a body in a parish churchyard in an unusual way; for instance, in an iron coffin. (*Rex v. Coleridge*, T. T. 1819, K. B. 2 B. & Ald. 806; S. C. 1 Chit. Rep. 588).

case, the indictment stated that the justice was in the execution of his office, which was not stated here of the clergyman. Here it did not appear that the clergyman was a clergyman at the time; or that he was in the execution of his office, or that he had any thing whatever to do with the parish in question. It was asked on the part of the prosecution that all these omissions should be supplied by intendment, or by a strained use of the word "unlawfully" as applied in general terms to the defendant's conduct: but this could not be allowed; for it was an established rule, that an indictment could not be aided by intendment. Judgment arrested.

Butter.

FOSTER v. TAYLOR, H. T. 1834. K. B. 3 N. & M. 244.

If firkins of butter be not marked according to the 36 Geo. 3 and 38 Geo. 3, no action can be maintained for the same.

THIS action was brought to recover the price of fifteen firkins of butter. The contract for the sale of and the delivery of the butter was proved; but it appeared that some of the firkins contained less than 56 lbs. each, and were none of them branded with the name of the seller. Upon this it was objected, on the part of the defendant, that the terms of the statutes of 36 Geo. 3, c. 86, and 38 Geo. 3, c. 73, had not been complied with, and that therefore the contract was void. Under the direction of *Patteson*, J., the jury found a verdict for the plaintiff.

Per Cur.—The regulations as to marking the casks in the 2nd section of the 36 Geo. 3, c. 86, are, "That every cooper or other person making a vessel for packing butter shall, on the bottom of the vessel, brand his christian name and surname at length, to denote that it is the mark of the cooper or maker of the vessel, together with the exact weight or tare, or, in default, for every such offence shall forfeit ten shillings;" and in the 3rd section, "That every dairyman, farmer, seller of butter, or other person, who shall pack any butter for sale, shall pack the same in vessels so made and marked as aforesaid, and no other; and shall on the bottom thereof, on the inside, and on the top on the inside, brand his christian name and surname at length; and shall also brand on the top on the outside, and on the bouge or body of the vessel, the true weight or tare of the empty vessel; and shall also brand his christian name and surname at length on the bouge or body of every vessel, across two different staves at least; and shall also imprint his christian name and surname upon the top of the butter, upon pain and penalty of forfeiting for every such offence the sum of five pounds." The 1st section of the 38 Geo. 3, c. 73, after reciting, amongst other things, "That the act was much avoided by concealing the places of abode of the coopers making the vessels, and of the dairymen or other packers of the butter," enacts, "That every cooper or other person making a vessel shall, on the bottom of the vessel, on the outside, in addition to his christian name and surname, brand the name of his place of abode or dwelling in the manner directed, or in default shall forfeit and pay the sum of ten shillings." The 2nd section directs, "That every factor or agent who shall buy or sell, or for the purpose of sale have in his custody any vessel containing butter for sale, not made and marked according to the directions of the act, shall forfeit and pay twenty shillings."

As the jury have found that the casks were not marked according to the act, it is to be considered what effect that has upon the present action. Where acts have been passed containing regulations as to articles which are the subject of sale, and the policy of the act is for the security of the buyers, and to protect them against the frauds of the seller, it has been held that the seller cannot recover the price; and within this rule the present case appears to us to fall.

See 10 *Bing.* 107; 2 *M. & W.* 149; 5 *Bing. N. S.* 86, *overruling Comyns v. Bager, Cro. Eliz.* 485; *Gremaire v. Le Clerc Bois Valon*, 2 *Camp.* 144.

Bye-Law. See tit. *Corporation*.

Cabin. See post, tit. *Ship and Shipping*.

Calendar Months. See post, tit. *Time*.

Calico Printer.*

REX v. TREGONING, H. T. 1828. Ex. 2 Y. & J. 132.

UPON an extent against Gould, a calico printer, it appeared that the claimants were warehousemen residing in the city of London, and had been in the habit of employing the Crown debtor, Gould, an entered calico printer, in printing white muslin for hire. They had sent him 600 pieces to print. At the time of issuing the extent, 329 pieces of calico, with respect to which the question arose, (the claim to the residue of the pieces being given up), were in the hands of the Crown debtor, having been received by him from the claimants for the purpose of being printed. The questions for the consideration of the Court were—first, whether the above-mentioned 329 pieces of calico, being in the state described, and in the possession of the entered printer, were liable to be seized under the extent for the excise duties charged upon him and unpaid; secondly, whether the Crown debtor, being only a printer of calicoes for hire, came within the description of a maker or manufacturer of the goods in his possession, within the meaning of the excise laws; and thirdly, whether these calicoes, not being the property of the Crown debtor, could be seized as such under the extent and inquisition.

Per Cur.—There is no common law right in the Crown to seize the goods of one person in payment of the debt due from another; and, therefore, the question is, is the printer the maker of these

Under an extent for duties at the suit of the Crown, calico sent to be printed cannot be seized for bygone duties.

* The 34 Geo. 3, c. 23, giving a special remedy for pirating the patterns of calico printers, does not exclude the jurisdiction of the Court to restrain by injunction, if the claim to originality be satisfactorily made out; where the evidence was not conclusive, the Court directed an issue, and an account to be kept as to the alleged copy; and (being capable of inspection) the Court examined the patterns, and decided without a reference to the Master. (*Sheriff v. Coates*, Chancery, 1 Russ. & M. 159. See 2 Vict. c. 13, extending benefits, 27 Geo. 3, c. 38, and 24 Geo. 3, c. 23, to Ireland; and 2 Vic. c. 17; and Mr. Godson's valuable work on Patents and Copyright, p. 413, 2nd edit.).

goods? It appears to us, that the statute, by which the duty is imposed, considered that some other person was the maker before the duty attached. Goods made of particular materials are, if printed, subjected to particular duties. Those duties are to be paid by the printer; and if the legislature had intended that the property upon which the printing was to be done was to be liable for such duty, that should have been clearly expressed. We believe there is no statute later than the 28 Geo. 3, which has reference to this claim. In order to make the goods liable within the meaning of that act, this person must be the manufacturer; that statute enacts, "That all goods and commodities, for or in respect whereof any duty of excise is by law imposed, and all materials, preparations, utensils, and vessels in the custody, not of the printer, but in the custody of the maker or manufacturer of such goods and commodities respectively, or in the custody or possession of any person or persons to the use of, or in trust for, such maker or manufacturer, shall be subject and liable to be seized." It is upon the construction of that part of the clause that the cases, which were shortly adverted to in Douglas's Reports, 416, are founded. Those cases proceeded upon the ground of the goods seized being the property of the maker, and in the custody of some person in trust for him. But can it be predicated here, that these articles are in the possession of this person as the maker? If not, the argument falls to the ground. The goods are only liable to the duty, by making the person in whose possession they are a manufacturer; if you fail in doing that, the Crown has no more right to seize them for this debt than it has to seize the goods of any person in this Court. We are not prepared to say, that inconveniences may not result from this decision; but the Court can arrive at no other upon the sound construction of this act of Parliament. If it is inconvenient, there will be no injustice in making the articles liable in specie for the amount of such duties; but the legislature have not so said. We think there ought to be judgment for the defendant.

On a subsequent day, after judgment—

The Court said.—We think it possible that the Crown may have a just claim on so many of these goods as have gone through the entire process of printing. The printer would have a lien upon them, and the Crown through that lien may, independently of the act of Parliament, have a right against those goods for the duties in respect of them. We thought at the time, that the extent had issued only in respect of other and by-gone duties due from Gould, and that there was no claim for duties in respect of these specific goods. If there be, the Crown has a claim to that extent.

Calling the Plaintiff. See post, tit. *Nonsuit*.

Cambridge. See post, tits. *Copyright—Universities*.

Canada. See *Drummond's case*, 2 Knapp, P. C. 295—and post, tit. *Habeas Corpus*.

Canals.

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I. RELATIVE TO THE CONSTRUCTION OF STATUTES CONNECTED WITH.

STOURBRIDGE CANAL COMPANY *v.* WHEELEY, T. T. 1831. K. B.
2 B. & Ad. 793.

By a canal act, the tolls were made payable on boats, &c., passing through any lock, and it exempted pleasure boats not used for carrying any goods, and it was not clear that the legislature intended to give the proprietors a right of compensation for using the part of the canal where there was no lock.

Canal acts are construed against the company, and in favour of the public.

The Court held, that such companies can impose no burthens on the public for their own benefit except that which is clearly given by the acts, and any ambiguity in the terms expressed in the statute must operate against the adventurers and in favour of the public.

THICKNESSE *v.* LANCASTER CANAL COMPANY, M. T. 1838. Ex.
4 M. & W. 472.

AN act of Parliament empowered a company to make a canal between certain termini, without specifying any time within which it was to be completed.

But if a statute, authorizing the formation of a

canal, states no time, the criterion is not a reasonable time, it may be done whenever the company please.

Per Cur.—As the act of Parliament has limited no precise time in which its provisions are to be executed, they are to continue till the company think proper to execute the work, and we are not aware of any decision yet, either in a court of law or equity, that there is any implied limitation as to their being executed within a reasonable time from the passing of the act; and even supposing that the powers of the canal company were to be executed within a reasonable length of time, it would be impossible for us to pronounce any opinion, whether a reasonable time has elapsed or not. We found our opinion on this, that the act of Parliament has not limited any precise time, and there being no authority that the courts are to supply such a limitation.

II. RELATIVE TO THE COMPENSATION TO BE PAID FOR THE LAND, AND CONTRACTS RELATING TO, AND OF THE RIGHTS AND DUTIES OF THE OWNERS OF LAND ADJOINING THE CANAL.

THICKNESSE *v.* LANCASTER CANAL COMPANY, M. T. 1838. Ex. 4 M. & W. 474.

The right to compensation does not extend to a lessee where the company do not require the land until his lease expires.

A CANAL act gave commissioners powers to purchase lands, &c., and directed them to make compensation to persons interested in lands, &c., for damage, &c. The question was, whether the right to compensation extended to a lessee whose term did not expire until a time previous to the canal company requiring the land.

Per Cur.—If the company disturb a tenant he is entitled to compensation; but if the tenant is allowed to retain possession until the Company really want the land, and that is not before the determination of his interest, what damage does he sustain? He is clearly not entitled to compensation.

TONE, CONSERVATORS OF, *v.* ASH, M. T. 1829. K. B. 10 B. & C. 349.

The right to purchase adjoining land must be exercised before the statute is repealed.

AN act for making a new canal, reciting, that it would be very prejudicial to a former old one, authorized and required the proprietors of the new one, within three calendar months, to contract and agree with the proprietors of the old for the absolute purchase of their interest, &c., and with the overseers of certain parishes who had interests in remainder under the acts for making the former canal. The local act for a new canal was subsequently repealed, and the proprietors never in fact contracted with the overseers of the parishes for their interests:—Held, that the limitation, as to the time for making such contract, extended to both branches, and that, at all events, the act providing for it having been repealed, they had then no power to purchase such interest.

REX *v.* NOTTINGHAM OLD WATERWORKS, M. T. 1835. K. B. 5 N. & M. 498.

Where compensation was to be

By 7 & 8 Geo. 4, c. 82, s. 2, it is enacted, "That it should and might be lawful to and for the company to continue, make, maintain,

complete, sink, lay down, fix, and keep water-works, houses, and other buildings, reservoirs, cisterns, tanks, aqueducts, weirs, &c., in or near the several parishes there named, of which *Lenton* was one; and from time to time to regulate, conduct, continue, cleanse, open, widen, enlarge, alter, amend, and use the same, and to discontinue the same, and make and maintain other works of the like or a different nature and sorts, as the said company should think fit and proper, subject to the restriction thereafter contained. And the company were authorized to enter lands, &c., mentioned and specified in the plans and books of reference, and to ascertain and set out such parts thereof as they should think necessary and proper for continuing, making, &c., and using the said waterworks, reservoirs, &c., and all other such works, matters, and conveniences as they should think necessary for effecting the purposes aforesaid; and also to construct, erect, do, and perform, all other matters and things which should be deemed necessary and convenient for the making, completing, improving, and continuing the said waterworks, and for conveying and bringing a sufficient supply of water to and through the several streets, &c., in Nottingham, and the parishes or townships of Burford, Radford, and Lenton; and they were empowered to supply the waterworks with water from certain springs in Burford parish, they doing as little damage as might be in the execution of the powers thereby granted, and making full satisfaction in manner thereafter mentioned to the owners and proprietors of and all persons interested in any lands, &c., which should be taken, used, removed, diverted, or injured for all damage to be by them sustained in or by the execution of all or any of the powers thereby granted." Section 15 enacted, "That, if at any time thereafter any person should sustain any damage in his lands, tenements, &c., by reason of the execution of any of the powers of that act, and for a compensation was not thereinbefore provided, then, and in every which such case such damages should be assessed by a jury as before directed with respect to such damages, &c., as were thereinbefore provided for."

made for
damage done in
erecting works
within certain
parishes:—
Held to extend
to damage done
beyond the
plans, but with-
in one of the
parishes.

It appeared that Turner was tenant for life of a water-mill on the river Leen at Lenton, Nottinghamshire. Before the act the company possessed certain works for raising water at a point below Turner's mill, and had there erected a weir across the river. After the passing of the act the company erected their works 100 yards higher up the river, where also they erected a new and a higher weir, which penned back the water upon Turner's mill, whereby the power and consequently the value of the mill was greatly diminished. Applications to the company for a removal of the weir, or for compensation for the injury sustained by her, were made by Turner, and afterwards by her attorney, but without effect. A notice, requiring the company to make compensation according to the provisions of the act, or to issue their warrant for the summoning of a jury for the purpose of assessing such damages, had been previously served; but the company neither tendered compensation nor issued their warrant as required. The mill of Turner was not mentioned in the schedule or book of reference, or marked in the maps or plans, nor was the old weir so mentioned or marked, but the part of the river Leen, which runs through the parish of Lenton, was delineated in the maps or plans.

Per Cur.—The words of the second section are large. The com-

pany are thereby authorized to continue and make weirs in the several parishes there named, and of which Lenton is one. That being so, we think this case is within the 15th section of the act.

DOE *v.* WARWICK CANAL COMPANY, H. T. 1836. C. P. 2 *Bing*. N. S. 481; S. C. 2 *Scott*, 717.

Where contracts for the conveyance of land are to be enrolled, all conveyances must be in writing.

THE local act, empowering proprietors to contract for and convey lands, directed such contracts, &c. to be enrolled, and copies to be evidence.

The Court held, that conveyances of land could only be in writing.

HARBOROUGH, EARL OF, *v.* SHARDLOW, E. T. 1841. Ex. 7 *M. & W.* 87.

And where, under a Canal Act, the contracts for lands, &c., are to be enrolled with the clerk of the peace, a mere writing and proof of payment of the sum agreed on does not vest the land in the Company.

THE 31st section of the 33 Geo. 3, c. 103, of the Oakham Canal Act, enabled the proprietors of lands "to contract for, sell, and convey," their lands to the Canal Company; and all such contracts, sales, and conveyances were to be made at the expense of the company, and "enrolled with the clerk of the peace." The 47th section enacts, that "upon payment of such sum or sums of money, as shall be contracted or agreed for between the parties, or determined and adjusted by the said commissioners, or any five or more of them, as assessed by such juries in manner hereinbefore respectively mentioned," the lands should vest in the company. On behalf of the defendant, it was proved, by the production of the receipts, that, at the formation of the canal a certain sum of money was paid by the company to Lord Harborough's father, as the purchase money for the land on which the trees in question had grown: it appeared that the plaintiff claimed the trees as well as the company.

Denman, C. J., told the jury, that he was of opinion that the payment of the money to the owner of the land by the company vested the title in them. On motion for a new trial—

Per Cur.—The only question is, whether the mode in which the case was placed before the jury by the Lord Chief Justice, according to the report he has made, was correct. It appears the question left to the jury was, whether the payments proved by the defendant were payments made in respect of the land in question, contracted for by the company with Lord Harborough for the purposes of the act of Parliament; and his Lordship expressed his opinion that they were. The question whether they had been a possession of forty or twenty years down to the period of the time of the act complained of, was not left to the jury. If it had been, and the jury had found there had been an occupation for twenty years down to the period of the act complained of, the verdict might have been supported; but, as there is no proof of continuous possession down to the time of these trees being cut, there must be a new trial. We think the direction was not correct; that is to say, it is not sufficient proof of title in the company to shew the payment of a sum of money to Lord Harborough's trustees in respect of the land in question, supposing it identified. We are of opinion, that, in order to convey a good title under the 47th section of the act of Parliament, there must be some deed or instrument in writing, as, in the event of any dispute, the commissioners are to be called in, assisted by a jury, in the manner pointed out by the act of Parliament.

DUDLEY NAVIGATION COMPANY *v.* GRAZEBROOK, T. T. 1830.
K. B. 1 B. & Ad. 59.

A CANAL act, empowering the proprietors to take the lands of individuals, reserved the rights of mines to the latter, but provided that they should not carry on any mining work under or within a certain distance of the canal, without the consent of the company, who should within thirty days after notice inspect, and within three months pay the value thereof to the owners; and if the company should neglect for thirty days after notice so to inspect, &c., then the owners should be at liberty to work the same, provided that in working such mines no injury were done to the navigation.

The Court held, that upon the company having neglected to avail themselves of the option, the owners were entitled to work the mines in the ordinary and usual mode, and that the proviso was to be construed with the qualification, that the party working the mines were to do no unnecessary or extraordinary damage to the navigation by working them out of the ordinary and usual mode.

Although a canal company have the power of purchasing the adjoining mines, still it is the duty of the owners to work them so as not to injure the navigation.

III. RELATIVE TO THE WIDENING AND DEEPENING, AND OF THE RIGHT TO THE WATER.

REX *v.* JUSTICES OF GLAMORGAN, H. T. 1828. K. B. 7 B. & C. 722.

By 30 Geo. 3, s. 1, the company of proprietors were authorized to make the canal, and to do all other acts which they might think necessary and convenient for the making, improving, and using the canal; and the profit of the company, on the money expended in making and completing the navigation, was not to exceed 8 per cent. per annum; and in order to ascertain the clear amount of the profits of the navigation the company were required to keep an account of the money laid out in making the canal, and of all charges incurred before the canal was completed, and also to make out an annual account balanced to the 29th of September, of the rates and of the charges attending the supporting, maintaining, and using the said navigation; and these accounts were to be laid before the justices at quarter sessions, and they were to reduce the rates whenever the clear profits of the navigation exceeded 8 per cent. upon the money laid out.

Per Cur.—And the company, after the making and completing the canal may widen and deepen it at the request of parties using it; and that the costs might be considered as an expense attending the using the canal which might be brought into charge and ought to be allowed.

Under the words "to do all things necessary for the making, extending, improving, and using, &c." a canal may be made deeper and wider.

BLAKEMORE *v.* GLAMORGAN CANAL COMPANY, E. T. 1835. Ex.
2 C. M. & R. 133.

By two local acts of Parliament, the 30 Geo. 3 and the 36 Geo. 3, the company were empowered to make the canal, and take the water from the river Taaffe, subject to restrictions imposed for the benefit of the proprietors along the banks who had previously obtained rights in that water. Among others were the plaintiffs, who were the occupiers of certain works termed the "Penttyrch and Melin

The power to enlarge and deepen a canal must be pursued within the time specified by the statute;

and the company have no right to draw off the surplus water.

Griffith Works;" and they complained that the defendants had violated the provisions of those acts, and thereby diminished the supply of water to their works. For this injury the present action was brought.

The Court said:—The Glamorgan Canal Act having been construed to entitle the company to enlarge and deepen it up to a certain period, but not after it should be completed, or after such extended time, they are liable at the suit of individuals if they afterwards do so, so as to produce injury to the legal rights of such individuals; and so likewise for the erection of new works; and therefore that they were liable for consequential damages arising from the greater abstraction of water occasioned by an increased traffic on the canal in consequence of new erections and improvements of the canal:—Held also, that upon the construction of s. 7, of 30 Geo. 3, c. 82, the surplus water directed to be conveyed to the P. works by means of the weir, was to be limited to water not necessary for the use of the canal at the particular lock, and that the company could not draw off water below the lock for the purposes of the canal below, thereby preventing any surplus water going to the P. works.

FINCH v. BIRMINGHAM CANAL COMPANY, T. T. 1826. K. B. 5 B. & C. 820; S. C. 8 D. & R. 680.

The 58 Geo. 3, (the General Canal Act, does not confer a right to take water from mines.

A FORMER act for making a canal gave no power to apply the water raised from adjoining mines; and a second act for another canal gave such power as to water raised from mines within 1000 yards, provided the produce of such mines were carried along some part of it. The canals were afterwards incorporated by another act; but it was provided that the former acts should be severally applicable to the respective canals.

The Court held that the proprietors could not justify the use of the water from a mine within 1000 yards of the second canal, on which not more than one-third of the produce was carried, although the whole produce might be carried along the first canal, and that the 58 Geo. 3, c. 19 (General Canal Act), did not give a right to take water from mines the produce whereof was carried along such first-mentioned canal.

IV. RELATIVE TO THE SHARES*.

HORNE *Ex parte*, H. T. 1828. K. B. 7 B. & C. 632.

The right to probate on shares of a canal is in the diocese where the transfers of the shares are filed at the company's office.

By an Act of the 31 Geo. 3, entitled, "An Act for making a canal from Birmingham to communicate with the Severn, near Worcester," certain persons were incorporated, and were empowered to raise a competent sum of money for making the canal, not exceeding 180,000*l.*, which said sum was to be divided into 1,800 equal shares, and the said "shares were to be deemed personal estate,

* An original subscriber to a canal navigation is not liable for any call made by the committee after he has assigned his share. (*Huddersfield Canal Company v. Buckley*, M. T. 1796, K. B., 7 T. R. 36). Where a statute empowers a company to sue for calls &c., by action of *debt*, or on the *case*, an action on the *case* in *tort* lies; and in such action interest for the non-payment of the calls may be recovered. *Ib.*

and transmissible as such, and not in the nature of real estate." By a subsequent act (48 Geo. 3, c. 49) the original deeds of bargain and sale, on transfer of any shares in the navigation, were required to be filed with and kept for the use of the company; and the company were authorized and required to nominate a clerk, who should, in a proper book provided for that purpose, enter and keep a true and perfect account of the names and places of abode of the several proprietors of the said navigation, and of the several persons who should from time to time become owners and proprietors, or entitled to any share or shares therein. The canal passed through parishes in the diocese of Worcester, and other parishes in the diocese of Litchfield and Coventry. The transfers of shares in the canal were filed at the public office of the company in the diocese of Litchfield and Coventry, where the dividends were also paid, and books of account kept.

The Court held that, for the purposes of probate, the right of a shareholder to a share of the profits, being personal property, might be considered as locally situate in the diocese of Litchfield and Coventry, and that a probate granted by the Consistorial Court of the bishop of that diocese was sufficient.

V. RELATIVE TO THE TOLLS*.

REX v. CONSERVATORS OF TONE, H. T. 1831. K. B. 1 B. & Ad. 561.

A COMPANY formed by act of Parliament, in order to render a river navigable, were empowered to take certain tolls, until the expense incurred, and interest, should be satisfied. To enable themselves to compete with a rival canal company, they took lower tolls than they were authorized.

Per Cur.—The statute of the 10 & 11 Will. 3 enacts, that, until the object therein mentioned, viz. the reimbursement of the conservators be accomplished, there shall be paid to them a toll not

Under statutes authorizing certain rates for the use of a canal, and certain tolls for the use of a lock, smaller sums may be charged.

One of several persons who have subscribed an agreement, inter se, to promote a joint undertaking for a projected canal, cannot withdraw his name and discharge himself from the engagement without the consent of the rest; (*Kidwelly Canal Company v. Raby*, H. T. 1816, Ex. 2 Price, 93); but the administrator of a deceased subscriber to a canal cannot be made liable personally for calls, either as a subscriber or proprietor of shares, unless a new contract be made to that effect. (*Weald of Kent Canal Company v. Robinson*, M. T. 1814, C. P. 5 Taunt. 801).

* A contract by a canal company (incorporated by statute) to reduce the toll otherwise payable by an individual, in consideration of his carrying all his coal into the canal, along a cut made at the expense of such party entering the said canal, after passing through land not within the statutable line of canal, was held illegal, it appearing that the rates could only be altered with the consent of the majority in value of the shareholders, which tolls were made a security for the money subscribed. (*Lees v. The Company of Proprietors of the Canal Navigation from Manchester to Ashton-under-Line and Oldham*, M. T. 1809, K. B., 11 East, 645).

Where one canal company have agreed to regulate the amount of their tolls by the rates fixed upon by another canal company, the former are bound to adhere to the rates agreed upon by the latter at a general assembly, and under their common seal; although, perhaps, the validity of such decree might have been collaterally questioned. (*The Company of Proprietors of the Monmouthshire Canal Navigation v. Kendall and Others*, E. T. 1821, K. B., 4 B. & Ald. 453). See Gunning on Tolls, 101.

exceeding a certain sum, in respect of the goods therein mentioned; and that, after that object is accomplished, there shall be paid to them certain less tolls; viz. 2*d.* for every weigh of coals, and 1*d.* for every ton of other goods, and no more. Under that statute, therefore, the conservators might, until they were fully reimbursed, exact the highest toll therein mentioned; but we think they might at their discretion take a lower. The statute of Anne, after reciting that it was necessary to erect a lock, and that great expense would be thereby occasioned, enacts, "That an additional toll of 1*s.* for every weigh of coals, and so on, shall be collected." The words of the enacting clause here are undoubtedly different from those in the former act; but the latter statute being in *pari materia*, and having the same object in view, viz. the reimbursement of the conservators, the clause giving the additional toll must be construed with reference to the clause giving the toll in the former statute; and so construing it, we are of opinion that, until the object contemplated, viz. the reimbursement of the conservators, is fully accomplished, the conservators are not bound by the act of Parliament to take the specific amount of the toll therein recited.

VI. RELATIVE TO THE RATEABILITY OF CANALS TO THE RELIEF OF THE POOR. See post, tit. *Poor*.

VII. RELATIVE TO ACTIONS CONNECTED WITH.

(a) BY CANAL COMPANIES.

MOORE *v.* ROBINSON, M. T. 1831. K. B. 2 B. & Ad. 817.

The manager of a canal boat, having weekly wages, may notwithstanding maintain trespass against a party for damaging his tackle attached to the boat.

TRESPASS for seizing and cutting in two a certain rope of the plaintiff belonging to and attached to a certain boat of the plaintiff. The boat was a fly-boat, navigating the Aire and Calder Canal, for the purpose of carrying goods, and was the property of the proprietors of the Aire and Calder navigation. The plaintiff was the master of the boat, and received weekly wages from the proprietors; but it appeared that he had the general superintendence of the boat, and that he hired another man to assist him in the navigation of it.

Lord Tenterden, C. J.—The plaintiff in this case had the care and superintendence of the boat, and he hired another person to assist him in the navigation. I own I find great difficulty in drawing the line between the present and the case of *Pitts v. Gaince*, (1 Salk. 10), which has been cited; and I think, upon the authority of that case, that the present plaintiff was entitled to maintain this action.

(b) ACTIONS AGAINST CANAL COMPANIES.

PARNABY *v.* LANCASTER CANAL COMPANY, T. T. 1839. Q. B. 3 N. & P. 623.

A clause in a canal act, that if the owner of a sunken boat omits to raise it in twenty-four hours, the company should, and charge the

ACTION on the case. The declaration stated, that, by the 32 Geo. 3, c. 107, the Lancaster Canal Company were incorporated for the purpose of making a canal from Kirby Kendall, in Westmoreland, to West Houghton, in the county of Lancaster, with various branches, to be navigable for boats, barges, and other vessels; that they were empowered to do all things necessary for the making of the canal, and to take tolls; that all persons might navigate with

boats and vessels of the proper size, upon payment of the tolls; that if any vessel should be placed or lie athwart any part of the canal, not being moored at each end, or if any person should wilfully obstruct the navigation of the said canal, and the person having the care thereof should not immediately, upon request, remove, or effectually secure the same, he should forfeit a sum of money to the company; and that they might cause the boat to be unloaded, if necessary, and to be removed so as to prevent the obstruction, and to seize such boat until the charges of such removal were paid; and if any boat should be *sunk* in the canal or branch, and the owner thereof should not, without loss of time, weigh or draw up the same, it should be lawful for the company to cause the same to be weighed and drawn up after the space of twenty-four hours, and to detain the same until the expenses of such weighing should be paid. It then alleged that the canal was completed, and the company received tolls; that the plaintiffs were the owners of a fly-boat, with which they were accustomed to navigate the canal as carriers; that on the 1st March, 1836, a boat sank in one of the branches of the canal, and lay athwart the same, and was moored at one end only, and obstructed the navigation, so that boats passing in the day-time could with difficulty pass, and boats passing at night were in danger of running foul of it; yet the defendants neglected their duty in this, that although a reasonable time had long elapsed before the accident, and the company could and might, and ought to have called on and required the owner to moor the same at both ends, or to remove and to weigh and draw up the same; and if the same had not been done, might and ought to have caused such boat to be weighed and drawn up, and could and ought to have caused some light, or other signal, to be placed in the mean time, to enable persons steering other boats in the night-time to avoid the same, yet the defendants did none of these acts; in consequence whereof, the plaintiffs being unable to see the obstruction in the night-time, struck their boat against the sunk boat, and it was broken, and great damage was done to the cargo, and the plaintiffs sustained a variety of losses.

The Court held that the company were liable to a person whose boat, while navigating along the canal, was injured in consequence of striking against a boat sunk in the canal, and which the company had had sufficient time to remove.

STAFFORD CANAL COMPANY *v.* HALLEN, H. T. 1827. K. B. 6 B. & C. 317.

THIS was an action of trespass on the case, brought against the defendant for digging clay-pits in a certain field, which adjoined the bank and towing path of the canal of plaintiffs, whereby a portion of the bank sunk down, and the towing-path became insecure, so that the plaintiffs were put to great expense for repairs. It appeared that the plaintiffs were established as a company for making and maintaining the Worcestershire and Staffordshire canals by stat. 6 Geo. 3; and the defendant was the owner of land in the parish of Kidderminster, in the county of Worcester, lying contiguous and next adjoining to the bank of the canal. The defendant, in the year 1825, dug clay-pits in the said field, in the direction of and near to the said bank, to the extent of fifty-five feet, and no apparent injury accrued to the bank or canal in consequence of such excavation; de-

expenses to the owner:—Held compulsory on the company, and that they were liable to an action for an accident occasioned by the non-removal.

A canal company were bound to repair the banks; the owner of the adjoining land dug clay-pits; the banks gave way. In an action for the damage, it is for the jury to say whether the banks were in repair or not; and not whether the banks fell.

from the digging.

fendant then further excavated another clay-pit, at the same distance from the bank, beyond the fifty-five feet; and in the month of July, 1825, that part of the bank contiguous to the said last-mentioned pit gave way. It appeared in evidence, that that part of the bank which fell in was composed of sand, and that it had not been adequately puddled, so as to keep the water from oozing through, and thereby injuring the bank. But, it also appeared, that the bank would not have given way if the pit had not been dug in the land adjoining thereto. The company were bound, by the act, to keep the banks, gates, bridges, &c. of the canal in sufficient repair. *Garrow, B.*, left it to the jury to say, whether the bank had fallen in in consequence of the defendant's digging for clay; and, if so, desired them to find a verdict for the plaintiffs. On motion for a new trial—

The Court held, that it ought to have been presented as a question of fact to the jury, whether, at the time of the alleged cause of complaint, the bank was in such a state as the act of Parliament required, and the owner of adjoining lands was entitled to expect; and not merely whether the falling of the bank was occasioned by the digging of the pits by the defendant.

TIBBITS v. YORKE, M. T. 1835. K. B. 5 N. & M. 609; S. C. 5 B. & Ad. 605.

A party who assumes the character of a commissioner, and is the trustee for the tolls under a canal act, is liable to a collector for his salary, the collector having been duly appointed by the commissioners.

BY an act for making the river Nen navigable, certain commissioners were empowered to nominate a clerk, whose salary and expenses were directed by the act to be paid by the proprietor of the tolls of the navigation. This was an action of debt brought by the plaintiff, as clerk to the commissioners acting in the eastern division of the river *Naine*, otherwise *Nine*, or *Nen*, in the county of Northampton, to recover of the defendant, as proprietor of the navigation between Oundle North Bridge and Thrapston Bridge, the sum of 87*l.* 2*s.* 1*d.*, claimed to be due to the plaintiff for his attendance, labour, trouble, and expenses as such clerk, under and by virtue of several acts of Parliament, viz. 13 Anne, 11 Geo. 1, c. 19, and 34 Geo. 3, c. 85. It appeared that the defendant had acted and assumed to be a proprietor, and was the treasurer, and received the tolls, though the evidence established he was not a shareholder.

Per Lord Denman, C. J.—This was an action by the clerk to the trustees of a navigation company, to recover a sum of money for his attendance, work, and labour in that capacity. It appears, that about fifteen years ago the defendant appointed plaintiff to receive the tolls, who accounted to the defendant; and that the money goes in repairs. The defendant, at one of the meetings of the commissioners, represented himself as the mortgagee of the tolls. This clerk, appointed by the commissioners, had, by the 7th section of 34 Geo. 3, c. 85, to look to the proprietors of this portion of the tolls for a moiety of his expenses. Now, if nothing more had appeared than the representation of the defendant, that he was the mortgagee of that portion, that would have been sufficient to have enabled the plaintiff to have maintained this action. Then, it is said, that there are certain deeds, which shew that the defendant is not a proprietor. But, supposing all to be as from the deeds it appears, still, within the meaning of the act of Parliament, the defendant is to be considered as the proprietor. Receiving these tolls as

he does, he is to take care to act justly with them; he is, by the deed of 1782, to be considered as the person liable to the charges imposed by the act of Parliament on the proprietor. I can never hold, that, where a person is acting under an authority given to him by a particular act of Parliament, and that act charges the party who is proprietor with the payment of the expenses incurred by him, he is bound to search out who has the legal title.

VIII. RELATIVE TO THE ACCOUNTS.

BRIDGWATER AND TAUNTON CANAL COMPANY, *v.* BLUETT, M. T.
1829. K. B. 10 B. & C. 393.

By a local act, power was given to the bishop of Bath and Wells and the justices of the county, or to any five justices, in the absence of the bishop, at the quarter sessions, to examine certain accounts and ascertain the balances. At a quarter sessions the accounts were produced, and the court adjourned the examination to the following sessions, when they examined the accounts and ascertained the balance.

The Court held, that the authority given had not been properly pursued, as the power was given to the bishop, &c., not as a court, and that they had no power to adjourn the examination to a future sessions; and the effect of the adjournment is to devolve the authority upon the bishop and justices, or any five justices, who may happen to be present at a subsequent sessions, thus changing the persons to whom, by the act of Parliament, the jurisdiction on this subject is intrusted. If it had appeared that the same five justices present at one sessions had adjourned the consideration of the accounts and were present at the second sessions, and they, and they only, ultimately decided upon the accounts, it might have been otherwise.

A power to justices at sessions, and a bishop, to inspect canal accounts, cannot be deemed a court of sessions, and therefore cannot adjourn the hearing.

IX. RELATIVE TO DESTROYING CANAL WORKS AND ROBBERIES CONNECTED WITH*.

Cancelling Acceptances. See ante, tit. *Bills and Notes.*

* By 7 & 8 Geo. 4, c. 30, s. 12,—If any person shall unlawfully and maliciously break across or cut down any bank or wall of any river, canal, or marsh, whereby any lands shall be overflowed or damaged, or shall be in danger of being so, or shall unlawfully and maliciously throw down, level, or otherwise, any lock, flood-gate, or other work on any navigable river or canal, such person shall be guilty of felony. And if any person shall unlawfully and maliciously cut off, draw up, or remove any piles, chalk, or other materials fixed in the ground, and used for securing any bank or wall of any river or canal, or do any other injury or mischief to any navigable river or canal, such person shall be guilty of felony.

The 3 & 4 Vict., c. 50, provides for keeping the peace, and as to offences committed on canals and navigable rivers.

Cancelling Cheques. See post, tit. *Cheque*.

Cancelling Contracts and Deeds. See post, tits. *Contract*
—*Deed*.

Candles. See post, tit. *Excise and Customs*.

Capacity. See tits. *Attainder—Husband and Wife—Bastard*
—*Lunatic—Idiot—Infant*.

Capias, in Civil Proceedings. See post, tit. *Process*.

Capias, in Criminal Proceedings. See post, tit. *Warrant*.

Capias ad Respondendum*.

Capias ad Satisfaciendum. See post, tit. *Execution*.

Capias Adlagatum. See post, tit. *Outlawry*.

Capiatur in Withernam. See post, tit. *Distress*.

Caption of Indictment. See post, tit. *Indictment*.

Caption of a Fine. See post, tit. *Fines and Recoveries*.

Capture. See post, tits. *Insurance—Prize*.

* Abolished by 2 Will. 4, c. 37. (See post, tit. *Process*).

Cards. See post, tit. *Gaming*.

Carpo. See post, tits. *Carrier—Charter-party—Insurance*.

Carnal Knowledge of Infants. See post, tit. *Rape*.

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Carriage. See tits. *Action—Driving*.

Carrier.

(5 *Peters. Abr.* 42).

See tits. *Bailment—Charter Party—Game—Highway—Sheep—Turnpike*.

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I. CARRIERS BY LAND*.

(a) OF CARRIERS OF PERSONS.

SHARP v. GREY, H. T. 1833. E. T. 9 *Bing.* 457; S. C. 2 M. & *Scott*, 620.—*S. P. BREMNER v. WILLIAMS*, 1 C. & P. 414.

A coach proprietor being bound to convey his passengers in safe vehicles, he is answerable for injuries arising from any defect in them, although it is not discoverable on ordinary examination.

ASSUMPSIT against a coach proprietor for not safely conveying the plaintiff from Chertsey to London. At the trial, it appeared that the plaintiff was a passenger on the coach of the defendant; the coach was overturned on its way from one place to the other, and the plaintiff injured. On the part of the defendant, it was proved that the overturning had arisen from a flaw in the fore-axle-tree, which caused it to break. It was shewn that the coach, at the time of purchasing it, was not new, but was apparently well conditioned. On the morning of the accident, previous to starting, it was carefully examined in the usual manner of examining stage-coaches by the defendant's servants: no defect was then perceptible. The place where the flaw in the iron axle-tree was discovered was covered with timber bound round it by iron clamps and screws: if those were not removed, the weak part could not be discovered. An inspector of mail-coaches was called, and he stated that the defendant's servants had pursued the usual and proper course in their examination of the coach; and that the removal of the screws and clamps in question on examining the vehicle would be improper and injurious; and that it was never done in examining the mail-coaches. The Judge left it to the jury to say, whether the defendant exercised that degree of diligence in inspecting the coach which was necessary to secure the safety of the passengers; at the same time telling them that the defendant was bound to provide a safe conveyance for the passengers he had contracted to carry. The jury found a verdict in favour of the plaintiff, damages 300*l.* On moving for a new trial—

Per Cur.—A coach proprietor is bound to provide a safe carriage for the conveyance of his passengers. The injury to the plaintiff was occasioned by an original defect in the coach. The defendant was bound to employ a carriage that should be safe at the time of the journey. It appears that this coach was then defective.

See 2 Camp. 79; *S. P.* 2 *Esp.* 533.

 (b) OF CARRIERS OF GOODS†.

* Semble, that a town carman, whose carts ply for hire near the wharfs, and who lets them by the hour, day, or job, is not a common carrier. (*Brind v. Dale*, 1837, 8 C. & P. 207; S. C. 2 M. & R. 80).

† By 1 & 2 Will. 4, c. 32, s. 68, (the Game Act), it is provided, that a license to sell game shall not be granted to "the owner, guard, or driver of any mail-coach or other vehicle employed in the conveyance of the mails of letters, or of any stage-coach, stage-waggon, van, or other public conveyance, or any carrier or higler, or any one in the employment of any of the above-mentioned persons."

1. *Of their Liabilities*.*

MILES v. CATTLE, T. T. 1830. C. P. 6 Bing. 743; S. C. 4 M. & P. 630.

CASE against coach proprietors for negligence. It appeared that the defendants were proprietors of a coach running from Stockton to York. The plaintiff was a passenger by the defendants' coach. Previous to his departure he received a parcel from a friend containing a 50*l.* bank note. This his friend requested him to book at defendants' office for London. Instead of booking it he put it in his own bag; and the bag, with its contents, was afterwards lost from the coach on its arrival at York. The jury found in favour of the plaintiff for 15*l.*, with leave for him to move to increase it to 65*l.*, if, under the circumstances, the Court should think him entitled to recover in respect of the 50*l.* note.

Per Cur.—In order to entitle him to recover, the plaintiff should have shewn that he had either the absolute or a special limited property in the thing lost. That the plaintiff was not the owner of the 50*l.* note is admitted. The question then is, whether he had it delivered to him on any bailment. As to this, the evidence was, that the parcel containing the note was entrusted to the plaintiff by Mr. Garbut, to be booked at the defendants' office at Stockton. In breach of this bailment, however, the plaintiff thought proper to put the parcel with his own luggage. By this means the owner was deprived of all remedy against the defendants for his loss; and the plaintiff was also a wrong-doer as regards the defendants, for he deprived them of the reward they would otherwise have been entitled to receive for the carriage of the parcel. Upon both grounds, therefore, and most particularly upon the latter, we are of opinion that the plaintiff is not in a situation to maintain the action in respect of the note.

See 4 B. & Al. 21.

STEPHENSON v. HART, H. T. 1828. C. P. 4 Bing. 476; S. C. 1 M. & P. 357.

TROVER against defendants, who were carriers, for the loss of a box. Plea, not guilty. It appeared that the defendants, as carriers, had received a box at Birmingham, directed to J. West, 27, Great Winchester Street, London; and on its being taken there the house was found to be shut up, and no person of the name of West resided in the street; and a week afterwards the defendants received a letter from a person calling himself West, desiring that the box might be sent to him at an inn in St. Albans, which the defendants accordingly did. West received the box there; but it afterwards

If a party receives a parcel from another, with directions to book it by a particular coach, but, instead of doing so, he puts it in his own bag, he being a passenger by the same coach, and it is lost, he cannot recover for the parcel against the coach proprietor.

If a package is directed to a person at a particular place, and if the carrier cannot find the person at that place, it is his duty to retain the package for the party send-

* If a message be left at the booking office of a carrier from N. to L. for his van to call for the plaintiff's luggage at another inn for the purpose of its being carried to L., and the carrier's servant and van go to the other inn, and the plaintiff's luggage be there put into the carrier's van, and afterwards lost therefrom, the carrier is liable for the loss, just as he would be if the luggage of the plaintiff had been taken to the defendant's regular booking office. (*Davey v. Mason*, 1 Car. & M. 45).

ing it; and if he delivers it to the person for whom it is sent at another place, that person having obtained the contents by fraud, he will be liable in trover for the package.

appeared that he had obtained them by fraud from the plaintiff. It was left to the jury to say, whether the defendants had delivered the goods in the ordinary course of business, and according to their duty as carriers. The jury found a verdict in favour of the plaintiff for 37*l.* 17*s.* 6*d.*, the value of the contents of the box.

Per Cur.—It is clear the box was not delivered in due course; the property it contained was still vested in the plaintiff, the box having been directed to West, at No. 27, Great Winchester Street; and on inquiry by the defendants' servants, it was ascertained that no such person resided there. It appears, too, that, when the plaintiff made inquiry for the box at the defendants' office in London, he was told, that it had been sent back to Birmingham. That was not true; and although it might have been placed in the office from which goods are conveyed from London to Birmingham, the plaintiff could not be aware of it. It has been mainly contended, however, that it was ultimately delivered to the right person. But West was a felon; and if so, the plaintiff's property in the goods had never changed: and can it be said for a moment, that a carrier does his duty by sending a box to a person at St. Albans, of whom he knows nothing, when it was directed to be delivered to a person of the same name in Great Winchester Street, London? It has been further urged, that it was impossible for the defendants to know who the original sender was, or who sent the box to their office at Birmingham; but they should have sent it back there, and they were not justified in forwarding it to St. Albans.

GILBART *v.* DALE, M. T. 1836. K. B. 5 *Ad. & E.* 543; S. C. 1 *N. & P.* 22.

In an action against a booking office keeper for not forwarding a parcel, it is not sufficient proof of negligence that it did not reach its destination, as his contract is only to deliver to the carrier.

CASE against the keeper of a booking office for not forwarding a box delivered to him to be forwarded to a certain place. Pleas—first, non assumpsit; secondly, denial of negligence. Issue joined on those pleas. At the trial, the delivery at the booking office, without any directions as to any particular mode of conveyance, was proved, and, moreover, that the parcel did not reach its destination. No further evidence of negligence on the part of the defendant was shewn, and the plaintiff was nonsuited. On moving to set aside the nonsuit—

Per Cur.—The defendant is not a carrier, but the keeper of a booking office. He has undertaken to deliver to the carrier, not to the consignee; and the plaintiff, in order to recover, must give some evidence of the non-performance of that contract. They attempt to do that, not by shewing the non-delivery to the carrier, but to the consignee: but the defendant never undertook to deliver to the consignee, but only to the carrier; and there is no evidence that he has not done so. The nonsuit was therefore right*.

See 1 *C. & P.* 110; 2 *Esp.* 533.

* If a carrier directs goods to be sent to a particular booking office, he is answerable for the negligence of the book-keeper. (*Colepepper v. Good*, 1832, 5 *C. & P.* 380).

2. Of Notices*.

PALMER v. GRAND JUNCTION RAILWAY COMPANY, H. T. 1839.
Ex. 4 M. & W. 749; S. C. 7 D. P. C. 232†.

CASE, against the defendants, as the owners of a railway, for not safely carrying certain horses of the plaintiff by the railway. By If a railway company exerts,

* By the common law, as understood in the reign of Hen. 8, a common carrier was only held responsible in case of loss where he had travelled by roads dangerous for robbery, or had driven by night or at any inconvenient hour. (Jones on Bailments, 103; Doct. & Stud., Dial. 2, ch. 38; Noy's Maxims, ch. 43, p. 93). In the reign of Elizabeth, however, a different rule prevailed; and it has long been established, that a common carrier by land or water is responsible for all losses except those occasioned by the act of God and the King's enemies. (1 Inst. 89; Moore, 462; 2 Roll. Ab. 2; Jones on Bailments, 103; *Trent Navigation v. Wood*, 3 Esp. 127). By "the act of God" is meant inevitable accident, (Jones on Bailments, 104, 105), and by "the King's enemies," public enemies with whom the nation is at war. In *Coggs v. Bernard*, (2 Ld. Raym. 909, 918), Lord Holt assigns the reason for this rule in these terms:—"The law charges this person thus intrusted to carry goods against all events, but acts of God and of the enemies of the King. For, though the force be never so great, as if an irresistible multitude of people should rob him, nevertheless he is chargeable. And this is a politic establishment, contrived by the policy of the law for the safety of all persons, the necessity of whose affairs obliges them to trust these sorts of persons, that they may be safe in their dealings; for else these carriers might have an opportunity of undoing all persons that had any dealings with them, by combining with thieves, &c., and yet doing it in such a clandestine manner as would not be possible to be discovered. And this is the reason the law is founded upon in that point."

And, in *Riley v. Horne*, (5 Bing. 217), *Best, C. J.*, observes—"When goods are delivered to a carrier, they are usually no longer under the eye of the owner; he seldom follows or sends any servant with them to the place of their destination. If they should be lost or injured by the grossest negligence of the carrier or his servants, or stolen by them, or by thieves in collusion with them, the owner would be unable to prove either of these causes of loss; his witnesses must be the carrier's servants, and they, knowing that they could not be contradicted, would excuse their masters and themselves. To give due security to property, the law has added to that responsibility of a carrier which immediately rises out of his contract to carry for a reward—namely, that of taking all reasonable care of it—the responsibility of an insurer. From his liability as an insurer the carrier is only to be relieved by two things, both so well known to all the country when they happen, that no person would be so rash as to attempt to prove that they had happened when they had not—namely, the act of God and the King's enemies."

In America, the law on this subject is thus stated by Mr. Justice Story in his excellent Treatise on Bailments, s. 497. (The work was published in the year 1832):—"The rule in respect to carriers by water established in England seems to be generally understood to be the rule in America. It has been recognized in an ample manner in several of the states. Recently, however, in New York, it has been adjudged, that the owners of a vessel bringing goods from New Orleans to New York for hire were not to be deemed common carriers; but this decision is in direct repugnance to prior decisions made on the same point in the same state. An effort, also, has been made in Pennsylvania to relax the general rigour of the rule, and to take a distinction between carriers on inland waters and carriers on land; but it does not seem yet to be settled. In respect to carriers on land, the rule of the common law seems every where admitted in its full rigour in the states governed by the jurisprudence of the common law. Louisiana follows the doctrine of the civil law in her own code."

† A keeper of a booking office cannot set up a notice, that he will not be answerable above a certain value, as a defence in a case of negligence of himself or his servants. (*Newborn v. Just*, 1825, 2 C. & P. 76).

the powers granted by the act constituting it, to act as a common carrier, it incurs the common-law

the statute 3 Will. 4, c. 34, (local and personal, public), the Grand Junction Railway Company are empowered to make a railway from Warrington to Birmingham: by section 154, they are empowered to receive certain tonnage rates, "for all articles, matters, or things carried or conveyed on the railway;" by section 156, the company are empowered to become carriers themselves, and are authorized,

By the civil law, the liabilities of the carrier, the inn keeper, and stable-keeper were equal, for the reason given by Ulpian, (Dig. Lib. 4, tit. 9, l. 1, s. 1), "quia necesse est plerumque eorum fidem sequi et res custodiæ eorum committere." It was on this ground, no doubt, that the Prætor's edict (Dig. Lib. 4, tit. 9) proceeded, when it ordained, "Nautæ, caupones, stabularii, quod cujusque saluum fore receperint, nisi restituent, in eos judicium dabo." To what precise extent, and against what injuries they were bound to preserve the bailment "saluum" is not quite certain. Ulpian (Ib. l. 3, s. 1) says, "at hoc edicto omnimodo qui recepit tenetur, etiamsi sine culpâ ejus res perit, vel damnum datum est; nisi si quid damno fatali contingit." This again leaves the question open, as it does not determine what a "damnum fatale" is. He mentions, however, as the opinion of Labeo, that shipwreck, attacks by pirates, and any vis major are among that class. Gaius (Ib. l. 5, s. 1) holds, that theft did not come within that class. They were, however, liable not merely for their own acts, but for those of their sailors, whether freemen or slaves. It was competent for them to limit their responsibility by a special contract; (Ib. l. 7); but this must of course have been subject to the rule laid down in Dig. Lib. 50, l. 23, "non valere, si conveniret, ne dolus præstetur." It will be observed, that the civil law was silent with respect to any distinction between carriers by land and carriers by water. (Heinec. Pand. Lib. 4, tit. 9).

In Scotland, the civil law may be said to prevail on this subject, as appears by Erskine's Institutes, (b. 3. tit. 1, s. 28), in which it is laid down: "By an edict of the Roman Prætor, called 'Nautæ, caupones, stabularii,' which is with some variations adopted into the law of Scotland, an obligation is induced by a traveller's entering into an inn, ship, or stable, and there depositing his goods, or putting up his horses, by which the innkeeper, shipmaster, or stabler, is bound to preserve for the owner whatever is entrusted to his care." (1 Bell's Com. 465-6).

The principle, and indeed the provisions of the civil law, are to be found in the Spanish laws of the Siete Partidas. In the 5th Partida, (l. 26), the masters of vessels plying by sea or in rivers are bound to protect the property confided to them against the fraud or misconduct not only of themselves, but of all persons on board; and against all loss and injury arising from whatever causes, except such as fire, floods, or the attacks of enemies.

By the Prussian code, (part 2, tit. 8, s. 15), it appears that the liabilities of a carrier, whether by sea or land, are not so extensive as were those prescribed by the civil law.

In France, the liability of carriers is in conformity with the provisions of the civil law. By article 1782 of the Code Civil, carriers by land and water are subjected to the same liabilities with respect to matters entrusted to them as innkeepers. The result of the provisions contained in articles 1784, 1953, 1954, is, that carriers by land and water are liable for all losses of, or injuries to, matters entrusted to them, where caused by the theft or misconduct of themselves, their servants, or strangers; but they are not liable for losses caused by robbery committed with armed, or other superior force, or for injuries caused by accident. Similar provisions are to be found in the Code de Commerce, arts. 103, 104, 105, 106, 107. Merlin, Répertoire, tit. Voiturier.

From this statement of the law of different countries, it will appear that the common law, as now existing in this country and America, is much more strict than the law of other countries in fixing liability on common carriers; but that, in the time of Henry 8, there was a much nearer approach in the common law to the provisions of the civil law than at present. This seems to be one of the many traces of the civil law to be found in our jurisprudence, which has either modified, or been modified by our institutions.

This strictness of the common law liability of a carrier may be modified either by special acceptances of the goods or by notices. The right of the carrier so to do, by means of a special acceptance of the goods, was intimated by Sir Edward Coke as early as *Southcote's case*, (4 Rep. 84); and since that time and that of *Coggs v. Bernard*, (2 Ld. Raym. 909), the right so to do has been clearly recognized. With respect to limiting the common-law responsibility by

if they shall think proper, “to use engines, &c., to carry and convey upon the railway all such passengers, cattle, goods, wares, and merchandize, articles, matters, and things, as shall be offered to them for that purpose, upon certain reasonable charges;” by the 214th section, “no action, suit, or information, nor any other proceeding of what nature soever, shall be brought, commenced, or

liability of a carrier, and can only limit that liability by a legal notice; and it is not necessary to give

means of public notices, the right of carriers’ notices has also long been admitted and sanctioned by the Court. (*Nicholson v. Willan*, 5 East, 507; S. C. 2 Smith, 107; *Batson v. Donovan*, 4 B. & Ald. 21). A variety of questions continually arose on these notices, as to whether they were sufficiently shewn to have been brought to the knowledge of the parties sending property by carriers. To remove that difficulty, as well as to render the liabilities of carriers more definite, and to facilitate remedies against them, the 11 Geo. 4 & 1 Will. 4, c. 68, was passed and came into operation on the 23rd July, 1830. It is intitled—

“An act for the more effectual protection of mail contractors, stage-coach proprietors, and other common carriers for hire, against the loss of or injury to parcels or packages delivered to them for conveyance or custody, the value and contents of which shall not be declared to them by the owners thereof.

Sect. 1.—“Whereas, by reason of the frequent practice of bankers and others of sending by the public mails, stage-coaches, waggons, vans, and other public conveyances by land for hire, parcels and packages containing money, bills, notes, jewellery, and other articles of great value, in small compass, much valuable property is rendered liable to depredation, and the responsibility of mail contractors, stage-coach proprietors, and common carriers for hire, is greatly increased; and whereas, through the frequent omission, by persons sending such parcels and packages, to notify the value and nature of the contents thereof, so as to enable such mail contractors, stage-coach proprietors, and other common carriers, by due diligence, to protect themselves against losses arising from their legal responsibility, and the difficulty of fixing parties with knowledge of notices published by such mail contractors, stage-coach proprietors, and other common carriers, with the intent to limit such responsibility, they have become exposed to great and unavoidable risks, and have thereby sustained heavy losses: be it therefore enacted by the King’s most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, that, from and after the passing of this act, no mail contractor, stage-coach proprietor, or other common carrier by land for hire, shall be liable for the loss of or injury to any article or articles or property of the descriptions following: (that is to say), gold or silver coin of this realm, or of any foreign state, or any gold or silver in a manufactured or unmanufactured state, or any precious stones, jewellery, watches, clocks, or time-pieces of any description, trinkets, bills, notes of the Governor and Company of the Banks of England, Scotland, and Ireland respectively, or of any other bank in Great Britain or Ireland, orders, notes, or securities for payment of money, English or foreign, stamps, maps, writings, title-deeds, paintings, engravings, pictures, gold or silver plate, or plated articles, glass, china, silks, in a manufactured or unmanufactured state, and whether wrought up or not wrought up with other materials, furs, or lace, or any of them contained in any parcel or package which shall have been delivered, either to be carried for hire or to accompany the person of any passenger in any mail or stage-coach, or other public conveyance, when the value of such article or articles or property aforesaid contained in such parcel or package shall exceed the sum of 10*l.*, unless at the time of the delivery thereof at the office, warehouse, or receiving-house of such mail contractor, stage-coach proprietor, or other common carrier, or to his, her, or their book-keeper, coachman, or other servant, for the purpose of being carried or of accompanying the person of any passenger as aforesaid, the value and nature of such article or articles or property shall have been declared by the person or persons sending or delivering the same; and such increased charge as hereinafter mentioned, or any engagement to pay the same, be accepted by the person receiving such parcel or package.”

Sect. 2.—“That, when any parcel or package containing any of the articles above specified shall be so delivered, and its value and contents declared as aforesaid, and such value shall exceed the sum of 10*l.*, it shall be lawful for such mail contractors, stage-coach proprietors, and other common carriers, to demand and receive an increased rate of charge, to be notified by some notice affixed in legible character in some public and conspicuous part of the office, warehouse, or other

notice before bringing an action for negligence, although such notice is rendered necessary in actions

prosecuted against any person *for any thing done or omitted to be done in pursuance of the act*, or in the execution of the powers, or authorities, or any of the orders made, given, or directed in, by, or under the act, unless fourteen days' previous notice, in writing, shall be given by the parties intending to commence or prosecute such action, &c., nor unless such action, &c. shall be

receiving-house, where such parcels or packages are received by them for the purpose of conveyance, stating the increased rates of charge required to be paid over and above the ordinary rate of carriage as a compensation for the greater risk and care to be taken for the safe conveyance of such valuable articles; and all persons sending or delivering parcels or packages containing such valuable articles as aforesaid at such office shall be bound by such notice, without further proof of the same having come to their knowledge."

Sect 3.—"That, when the value shall have been so declared, and the increased rate of charge paid, or an engagement to pay the same shall have been accepted as hereinbefore mentioned, the person receiving such increased rate of charge, or accepting such agreement, shall, if thereto required, sign a receipt for the package or parcel, acknowledging the same to have been insured, which receipt shall not be liable to any stamp duty; and if such receipt shall not be given when required, or such notice as aforesaid shall not have been affixed, the mail contractor, stage-coach proprietor, or other common carrier as aforesaid, shall not have or be entitled to any benefit or advantage under this act, but shall be liable and responsible as at the common law, and be liable to refund the increased rate of charge."

Sect. 4.—"That, from and after the 1st day of September now next ensuing, no public notice or declaration heretofore made or hereafter to be made, shall be deemed or construed to limit or in anywise affect the liability at common law of any such mail contractors, stage-coach proprietors, or other public common carriers as aforesaid, for or in respect of any articles or goods to be carried and conveyed by them; but that all and every such mail contractors, stage-coach proprietors, and other common carriers as aforesaid, shall from and after the said first day of September be liable, as at the common law, to answer for the loss of or any injury to any articles and goods in respect whereof they may not be entitled to the benefit of this act, any public notice or declaration by them made and given contrary thereto, or in anywise limiting such liability, notwithstanding."

Sect. 5.—"That, for the purposes of this act, every office, warehouse, or receiving house, which shall be used or appointed by any mail contractor or stage-coach proprietor, or other such common carrier as aforesaid, for the receiving of parcels to be conveyed as aforesaid, shall be deemed and taken to be the receiving house, warehouse, or office of such mail contractor, stage-coach proprietor, or other common carrier; and that any one or more of such mail contractors, stage-coach proprietors, or common carriers, shall be liable to be sued by his, her, or their name or names only; and that no action or suit commenced to recover damages for loss or injury to any parcel, package, or person, shall abate for the want of joining any co-proprietor or co-partner in such mail, stage-coach, or other public conveyance by land for hire as aforesaid."

Sect. 6.—"That nothing in this act contained shall extend, or be construed to annul or in anywise affect any special contract between such mail contractor, stage-coach proprietor, or common carrier, or any other parties, for the conveyance of goods and merchandizes." (The 7 & 8 Geo. 4, c. 39, repealed the 3 Will. & Mar. c. 12, and the 21 Geo. 2, c. 28, by which power was given to the quarter sessions to settle rates of carriage demanded by carriers).

7th.—"That where any parcel or package shall have been delivered at any such office, and the value and contents declared as aforesaid, and the increased rate of charges been paid, and such parcels or packages shall have been lost or damaged, the party entitled to recover damages, in respect of such loss or damage, shall also be entitled to recover back such increased charges so paid as aforesaid, in addition to the value of such parcel or package."

8th.—"That nothing in this act shall be deemed to protect any mail contractor, stage-coach proprietor, or other common carrier for hire, from liability to answer for loss or injury to any goods or articles whatsoever arising from the felonious acts of any coachman, guard, book-keeper, porter, or other servant in his or their employ; nor to protect any such coachman, guard, book-keeper, or other servant from liability for any loss or injury occasioned by his or their own personal neglect or misconduct." (It will be observed that there is no provision here with respect to the felonious acts of the carrier himself).

brought within three months;" and, by the 215th section, power to tender amends is given. Under the 156th section, the company became carriers themselves. It was not shewn that any notice had been given by the defendants restricting their common-law liability.

Per Cur.—One question is, whether notice of action was received. That turns upon whether this is a case in which notice was requisite by the 214th section of the act. If the action was brought against the railway company for the omission of some duty imposed upon them by the act, this notice would be required. If, for instance, it was founded on a neglect in not duly fencing the railway, on account of which the travelling on it was dangerous to those passing along it, assuming that such an obligation resulted from the 180th section, or from the general provisions of the act, that case would have fallen within the 214th section. But, when the matter is looked at and explained, it appears that the action is not of that nature; but the defendants are sued as common carriers, who have received nine horses for the purpose of being taken to their journey's end, which they have not so delivered, but that, on the contrary,

brought against them for matters done "in pursuance" of their act.

9th.—"That such mail contractors, stage-coach proprietors, or other common carriers for hire, shall not be concluded as to the value of any such parcel or package by the value so declared as aforesaid, but that he or they shall in all cases be entitled to require, from the party suing in respect of any loss or injury, proof of the actual value of the contents by the ordinary legal evidence; and that the mail contractors, stage-coach proprietors, or other common carriers as aforesaid, shall be liable to such damages only as shall be proved as aforesaid, not exceeding the declared value, together with the increased charges, as before mentioned."

10th.—"That in all actions to be brought against any such mail contractor, stage-coach proprietor, or other common carrier as aforesaid, for the loss of or injury to any goods delivered to be carried, whether the value of such goods shall have been declared or not, it shall be lawful for the defendant or defendants to pay money into court, in the same manner, and with the same effect, as money may be paid into court in any other action."

As there is no limitation as to the part of the dominions of the crown in which it is to be in force, this act will extend to Scotland and Ireland, as well as England.

The general effects of this act seem to be these:—1st, that carriers by *land* only are within its provisions; so that the law previously existing as to notices is still in force with regard to carriers by water: 2ndly, that it applies only to those cases where the excepted article *exceeds* in value the sum of 10*l*. With respect, therefore, to cases where the value even of the excepted articles amounts only to 10*l*., or any less sum, the common-law liability attaches: 3rdly, in order to avail himself of the statute with regard to the excepted articles, the carrier must affix, in a conspicuous place in the receiving office, a notice stating the extra charges payable for the carriage of goods; but if he does, and the amount of the carriage is paid, or agreed to be paid, he will be liable for the amount as at common law; as he will also be, where no extra charge is paid, if the loss arises from the felonious conduct of his servants. He must, to entitle himself to the benefit of the act, also give a receipt for the goods and extra charge: 4thly, the declaration of the value must be made by the party delivering the goods, whether demanded or not: 5thly, that as to any goods except those mentioned in the first section, and even as to those, where not exceeding 10*l*. in value, the common-law liability of the carrier remains, even though he should put up any notice limiting his responsibility: 6thly, that the carrier and customer are still at liberty to make special contracts for the conveyance of goods; but a notice merely will not constitute, it seems, a special contract, even though brought to the knowledge of the customer: 7thly, coachmen, guards, book-keepers, and other servants of the carrier, are still liable for any loss or injury occasioned by their own personal neglect or misconduct: 8thly, carriers are only to be liable for the *proved*, and not the *declared* amount of damage. For the cases on the construction of this act, see the text, and subsequent notes.

one has been killed, and three severely injured, in consequence of an accident on the railroad. The action is brought against them, therefore, in their character of common carriers; and it appears to us, that a breach of their duty in that character is not a thing omitted to be done in pursuance of the act, or in the execution of the powers or authorities given by it. The act does not compel them to be common carriers; it only enables them to be so, so far as they shall think fit; and when they have elected to become so, they are liable, in that character, in the same way that other common carriers are. On that ground, we think the 214th section does not apply to this case. The 156th section provides, "that it shall be lawful for the said company (if they shall think proper) to use and employ locomotive and other engines, or other moving power, and in carriages and waggons drawn and propelled thereby to carry and convey upon the said railway all such passengers, cattle, goods, wares, and merchandize, articles, matters, and things as shall be offered to them for that purpose." If the company choose to carry, and do not take care to accept the goods with a limited responsibility, of which we are to assume there is no evidence in the present case, then the question is, whether the common-law duty is not cast upon them: and we are of opinion that it is; and that, having received these horses to carry them from Liverpool to Birmingham, and safely deliver them, which they have not done, they are liable; as the accident did not happen from the act of God or the Queen's enemies, which are the exceptions in favour of carriers.

See 2 Stark. N. P. C. 323; 3 Nev. & P. 523; 10 B. & C. 284; S. C. 5 M. & R. 231; 11 Moore, 459; S. C. 3 Bing. 603; 5 East, 114; 3 M. & Sel. 580; 8 B. & C. 697; 3 M. & R. 365; 5 Bing. 270; S. C. 2 M. & P. 429; 4 B. & C. 200; S. C. 6 D. & R. 257; 10 Bing. 19; S. C. 3 M. & Scott, 371; 1 C. & M. 662; 1 C., M. & R. 754; 5 Ad. & E. 647; S. C. 1 Nev. & P. 104; 6 Ad. & E. 663; S. C. 1 Nev. & P. 665; 1 Mylne & K. 154, 162; 1 C. & P. 251; 2 Camp. 81.

RILEY v. HORNE, M. T. 1828. C. P. 5 Bing. 217; S. C. 2 M. & P. 331.

A notice at a coach-office limiting the coach proprietor's responsibility on journeys from the office, refers to journeys out and home; but it is a question for the jury, whether the customer was aware that the coach was one of those running from the office.

CASE against a carrier for the loss of a parcel. Plea, not guilty. It appeared, at the trial, that the plaintiffs were silk weavers residing in London, and that they had a manufactory at Kettering; that the defendants were the proprietors of a coach which ran from the George and Blue Boar, Holborn, to Kettering and back. The parcel, for the loss of which the action was brought, was delivered at the defendants' office at Kettering by the plaintiffs' agent or servant, who stated that it was to be conveyed to London, and he paid 2*d.* for booking it; but it did not appear that the agent had ever seen or that he knew that there was any notice in the coach-office at Kettering. The plaintiffs proved that the parcel was never delivered to them in London. The defendants put in a notice, which was painted on a board and placed in a conspicuous part of the office in London, of which the following is a copy:—"George and Blue Boar, Holborn, London. Take notice, the proprietors of carriages which *set out from this office* will not hold themselves accountable for any passenger's luggage, truss, parcel, or any package whatever, above the value of five pounds, if lost or damaged, unless the same

be entered as such and paid for accordingly, *when delivered here, or to their agents in town or country*; nor will they be accountable for any glass, china, plate, watches, writings, cash, bank-notes, or jewels, of any description, however small in value." The defendants then proved that the plaintiffs were aware of this notice, and that they had frequently sent goods to and from Kettering by the defendants' coach; and it was contended that they were not liable, as the notice formed part of the contract under which the parcel was received at Kettering, and that it ought to have been entered and paid for accordingly. The Judge was of opinion that the notice at the office in London applied only to the journey *from* thence to Kettering, and not to the journey back. The jury, accordingly, found a verdict for the plaintiffs.

For the judgment, see the case of *Macklin v. Waterhouse*, p. 480.

See 3 B. & C. 601; S. C. 5 D. & R. 484; 1 C. & P. 550; 3 & 4 W. & M. c. 12, s. 24; 4 B. & Ald. 21; 4 Burr. 2298; *Aleyn*, 93; *Carth.* 485; 1 *Stra.* 145; 5 B. & Ald. 342; 3 *Camp.* 267; S. C. 16 *East*, 244; 2 B. & Ald. 356; 4 *Price*, 31; *Gow's N. P. C.* 115; 1 M. & P. 357; 3 C. & P. 318; S. C. 1 M. & M. 154.

KERR v. WILLAN, E. T. 1817. K. B. 6 *Mau. & Sel.* 150; S. C. 2 *Stark.* 53.

ASSUMPSIT, for non-delivery of a parcel of black cloth by defendant, who was a common carrier from London to Dumfries. Plea, non assumpsit, and payment into Court of 10*l.* 10*s.* In the waggon-office at which the parcel was delivered a board was stuck up in a conspicuous part, and on it was painted a notice limiting the amount of the carrier's liability to the amount paid into Court. The porter who carried the cloth, and who had been there very frequently, stated that he knew there was a board in the office, but he had never read it, and was unaware of its contents. It not being shewn that the plaintiff's agent was acquainted with the terms of the notice, the jury, under direction, found for the amount of the cloth in favour of the plaintiff. On a motion for a new trial—

Per Cur.—At the trial, the question whether any notice had reached the plaintiff was left to the jury. To require a notice in such cases, although it may augment the duties of the carrier, is certainly not imposing on him an insurmountable difficulty; for this would be removed if a receipt was given for each delivery, with a notice printed on the receipt restraining his liability.

See 6 T. R. 14.

MAYHEW v. EAMES, H. T. 1825. K. B. 3 B. & C. 601; S. C. 5 D. & R. 484.

ASSUMPSIT, against the defendants as carriers, for the amount of certain country bank-notes entrusted to their care. Plea, non assumpsit. It appeared that one Hughes, the plaintiffs' traveller, on the 10th of February, 1824, at Downham, in Norfolk, having collected on their account 87*l.* in country bank-notes, enclosed them in a parcel which he addressed to the plaintiffs, "Foster-lane, Cheap-side, London;" and on one corner of the parcel he wrote the word "mourning." He then delivered the parcel to Wright, the keeper of the Castle Inn at Downham, for the purpose of being forwarded

The notice must be shewn to have come to the knowledge of the customer; it is not sufficient to shew that the notice was on a board, which the customer *might* have seen.

Where a principal was aware that a coach proprietor had given notice that he would not be answerable for bank-notes sent by his coach, and an agent un-

aware of the notice sent a package of theirs by the defendant's coach, it was held that the latter was not answerable.

to London by the defendants' Lynn coach, which stopped at the Castle to change horses. He paid Wright 1s. 2d. for the carriage of the parcel, and obtained a receipt for it, but did not acquaint him with the value. When the coach arrived at the Castle, Wright delivered the parcel to the coachman, but it was lost. For the defendants, it was proved that before the 10th of February, 1824, the plaintiffs were in the habit of receiving parcels by coaches coming to the White Horse Inn, Fetter-lane, London, which was the destination of the defendants' Lynn coach; and that the porter of the inn, when he delivered such parcels, always left with them a ticket or invoice containing the amount of charge for carriage and portage, and a printed notice signed by "J. Eames," one of the defendants, "that the proprietors of carriages which set out from this office will not hold themselves accountable for any passenger's luggage, trunks, parcel, or any package whatever, above the value of 5*l.*, if lost or damaged, unless the same is entered as such and paid for accordingly when delivered here, or to their agents in town or country; nor will they be accountable for any glass, china, plate, watches, writings, cash, bank-notes, or jewels of any description, however small the value." There was no proof that Hughes, the plaintiffs' traveller, knew of the notice at the time he delivered the parcel to Wright at Downham, but he stated, that the plaintiffs were in the habit of receiving parcels by the defendants' coaches. The plaintiffs were nonsuited, with leave to move to enter a verdict for 87*l.*

Per Curiam.—In order to entitle common carriers to the protection of a notice of restricted liability, it must be shewn that the person who sends the goods has knowledge of the existence of such notice; but the knowledge of the principal is the knowledge of the agent employed to transmit the goods. Here, there is distinct evidence that the plaintiffs themselves knew that the defendants would not hold themselves accountable for bank-notes lost in the course of transmission by their coaches. If, therefore, the plaintiffs knew that the defendants would not be accountable for such property coming by their coaches, it was their duty to give a proper caution to their traveller, and direct him to send his money parcels by some other conveyance. Instead of which, they suffer the traveller to send the parcel by the defendants' coach, whereby it is lost. It appears to us, therefore, that, as the plaintiffs have acted without due caution, and at their own risk, the defendants are not liable for the consequences.

See 16 *East*, 244; 1 *H. Bl.* 298; 4 *East*, 370; 3 *Taunt.* 264 *.

MARSH *v.* HORNE, E. T. 1826. K. B. 5 *B. & C.* 322; S. C. 8 *D. & R.* 223.

Mere knowledge by the car-

ASSUMPSIT, against a common carrier for the loss of two boxes of silk delivered to the defendant to be carried from London to Bath,

* A parcel containing 200 sovereigns inclosed in six pounds of tea was sent by coach, and paid for as of ordinary value; both the party sending and the owner of the parcel being aware of a notice by the coach proprietors limiting their responsibility to 5*l.*: the parcel was stolen by one of the porters of the coach, while it was standing in the street at a manufacturing town in the course of its journey. In an action to recover the value from the coach proprietors, the defendants had a verdict, on the ground, that the loss was occasioned by the improper mode in which the parcel had been committed to their care. (*Bradley v. Waterhouse and Briggs*, 3 *C. & P.* 128).

and alleged to have been lost through the negligence of the defendant. Plea, general issue. A special verdict was found, which stated that the defendant had given a public notice that he would not hold himself accountable for any parcel above the value of 5*l.*, if lost or damaged, unless the same was insured and paid for accordingly. The goods in question were of the value of 226*l.* 3*s.* 8*d.* At the time of the delivery of them to the defendant the plaintiff was aware of the notice, and the defendant knew that the value of the goods exceeded 5*l.* No statement of the value was however made, nor was any payment either demanded or made beyond the fee for booking. In the progress of the journey the silk was either lost or stolen from the hind-boot of the coach, wherein they had been placed by the defendant, and not exposed to greater than ordinary risk.

rier of the value being above the limited sum will not free the customer from complying with the terms of the notice.

Per Cur.—We think that the mere knowledge of the value of the goods on the part of the defendant did not free the plaintiff from the necessity of complying with the terms of the notice. The judgment must be entered for the defendant.

See 16 *East*, 244; 3 *Campb.* 527; 4 *Burr.* 2298; *Carth.* 485; 3 *Taunt.* 264; 1 *Price*, 280.

BROOKE *v.* PICKWICK, E. T. 1827. C. P. 4 *Bing.* 218. 12 *Moore*, 447.

CASE, against a stage-coach proprietor for the loss of a trunk containing wearing apparel and jewellery. It appeared that the plaintiff took places for the conveyance of himself and his daughter by the defendant's coach from Bath to Exeter. His luggage consisted of three trunks; one of them, which from its size the defendant might have supposed contained property of a larger value than 5*l.*, was lost on the road. When the coach left Bath it appeared that the plaintiff saw his trunk deposited in the boot of the coach. At Taunton, for the convenience of the proprietors, the coach was changed. The plaintiff again inquired about his luggage, and requested the coachman to take care of it. The coachman answered that he had done so. From Bath to Taunton there was a man on the coach to guard the luggage, but no guard beyond that place. On the arrival of the coach at Exeter the trunk in question was missed. Inquiry was made, and three days afterwards it was discovered, emptied of its contents, in a field about a mile from Taunton. Exactly opposite the entrance of the office was a notice printed on a board limiting the defendant's responsibility to 5*l.* for parcels and packages, unless booked and paid for as of higher value. It did not appear whether the plaintiff or his daughter had read this notice or not. The Judge left it to the jury to say whether or not the plaintiff had notice of the defendant's limitation of his responsibility, and whether the defendant had not been guilty of gross negligence in not taking care of the trunk, in which latter case the notice if established would not avail him. The jury found for the plaintiff; the amount of damages to be ascertained by a reference. On shewing cause against a rule nisi for a new trial—

Where the carrier must have known the value of the package to be more than the limited amount, but no disclosure of the value was made or demanded on either side, it was held a right direction to the jury to consider whether the carrier had been guilty of gross negligence, although the customer was aware of the notice.

Per Cur.—It is clear that in all cases the notice will excuse the carrier where it is brought home to the knowledge of the party; but it will not excuse him where he has been guilty of gross negligence. Was there gross negligence in this case? The jury have found that there was, and they could not have found otherwise. There was no evidence as to when or how the trunk was lost. It either was not

put upon the coach at all when they changed at Taunton, or, if it was put thereon, it was not secured with sufficient care, and might in consequence have fallen on the road. It has been argued on the part of the defendant, that the jury should have been told that it was the duty of the plaintiff to inform the defendant of the value of the trunk. Whether he was apprised of the value or not is immaterial. From its appearance he must have known that it exceeded the value of 5*l*. If the carrier has given notice to the party that he will not, under certain circumstances, be responsible for a package, unless the value be disclosed at the time, and an additional payment made, the notice will absolve him from liability as an insurer, if its terms are not complied with; but still he is bound to use due diligence, whether notice be given or not.

See 5 *B. & C.* 822; 4 *B. & H.* 21; 4 *Bing.* 476; *S. C.* 1 *M. & P.* 357; 1 *M & P.* 583; 5 *Bing.* 212; *S. C.* 2 *M. & P.* 319; 5 *Bing.* 217; 2 *M. & P.* 331.

MACKLIN *v.* WATERHOUSE and Others, *M. T.* 1828, *C. P.* 5
Bing. 212; *S. C.* 2 *M. & P.* 319.

If a carrier does not ask the value of a package at the time of receiving it, or having asked receives it without being informed, he is answerable for the value, whatever it may be; and his notice will not protect him from the consequences of gross negligence.

A notice in a coach-office does not limit the common-law liability of a coach proprietor, whose coach runs from that office, unless it is shewn that he is also proprietor of it.

CASE, against defendants as the proprietors of the Exeter mail-coach, for the loss of a parcel. There was also a count in trover. Plea, not guilty. At the trial, it appeared that the defendants were the proprietors of the Exeter mail-coach running thence, through Salisbury, to London. It was proved that the plaintiff's attorney at Salisbury sent a female servant with a parcel containing Salisbury bank-notes and half-sovereigns, of the value of 49*l*., to a coach-office at Salisbury kept by one Weeks, on the outside of which was painted, in large letters, "Weeks's mail and general coach-office;" but it did not appear, nor did the plaintiff offer any evidence to shew, that Weeks, the proprietor of that office, was one of the above-named defendants, or that the plaintiff or his attorney knew that the proprietor of the office there had any interest in the Exeter mail. For the defendants, the book-keeper at Weeks's office at Salisbury was called, who stated that the woman who brought the parcel told him it was a parcel of consequence, but that she did not know what its value was; that thereupon he, the book-keeper, told her that it ought to be insured; but that he booked it for London without its being insured, and that the servant paid twopence for booking. It was then proved that a notice to the following effect was stuck up on a board in a conspicuous part of the office at Salisbury:—"Take notice, *the proprietor of this office* will not be accountable for any parcel or package exceeding the value of 5*l*., unless entered as such, and paid for accordingly." The defendants also proved that both the plaintiff and his attorney were aware of this notice at the time the latter sent his servant with the parcel, which was proved to have been forwarded to London by the defendant's coach, and admitted by Mr. Waterhouse to have been stolen by a youth (a servant in their employ), whose duty it was to take care of and watch parcels sent to the office in Lad-lane, directed to persons residing in and near London. The jury found that there had been no negligence or concealment by the plaintiff, and that the defendants had been guilty of negligence, and returned a verdict in favour of the plaintiff, damages 49*l*., the alleged value of the parcel. A rule for entering a nonsuit was afterwards obtained, and cause shewn against it.

Best, C. J., delivered the judgment of the Court. The notice by a carrier will protect him, unless the jury think that no prudent person having the care of an important concern of his own, would have conducted himself with so much inattention or want of prudence as the carrier has been guilty of. If a notice touching the responsibility of the carrier be given, it matters not by whom it is given, or in what form, if it inform the owner of the goods that the carrier, by whom he proposes to send them, will not undertake for their safe conveyance unless paid a premium proportioned to their value. We have established these points: that a carrier is an insurer of the goods that he carries; that he is obliged, for a reasonable reward, to carry any goods that are offered him to the place to which he professes to carry goods, if his carriage will hold them and he is informed of their quality and value; that he is not obliged to take a package the owner of which will not inform him what are its contents, and of what value they are; that, if he does not ask for this information, or if, when he asks and is not answered, he still takes the goods, he is answerable for their amount, whatever that may be; that he may limit his responsibility as an insurer by notice; but that a notice will not protect him against the consequences of a loss by *gross* negligence. Let us see how these principles bear on the two cases now under our consideration. In *Macklin v. Waterhouse*, the notice was in these words: "Take notice, the proprietors of this office will not be accountable for any parcel or package exceeding the value of 5*l.*, unless entered as such, and paid for accordingly." A Mr. Weeks was the keeper of this office, at which parcels were received and booked for several coaches belonging to different proprietors. No evidence was given that Weeks, the proprietor of the office, was the same Weeks who was one of the defendants, or that the plaintiff or his agent knew that the office-keeper had any interest in this coach. No one can collect from the notice that the proprietor of the office had any thing to do with any of the coaches that took parcels from that office. If he had by his notice told those who had occasion to go to his office, that none of the proprietors of coaches that took parcels from it would be responsible, such a notice would have been sufficient. The persons who carry parcels to coach-offices are generally servants and other persons, who cannot have much knowledge of matters of this sort. The notice should be plain, and easily understood by such persons. They are not to be required to determine whether a notice given by the keeper of a coach-office must apply to the risks undertaken by all the coach proprietors whose coaches are loaded from that office. This is a case without sufficient notice, and the defendants are subject to the unlimited responsibility of common carriers. It is not necessary to decide in this case whether, if it had been shewn that Weeks was a proprietor of the coach, a notice given by him as proprietor of the office could form a special condition in his contract as a coach proprietor. This is an answer to the point made at the trial, that the notice in this case should have been stated in the declaration; for as there was no *sufficient* notice, it is the same as if there was *no* notice. But it was said that the declaration stated that the loss was through the negligence of the defendant, and that there was no proof of any negligence. Certainly not sufficient proof of *gross* negligence; but, as there was no notice, the allegation of loss by negligence was not a material allegation, and

no proof of it was necessary. If, however, any proof of such allegation was necessary, a loss, the cause of which is shewn, is sufficient evidence of simple negligence, although not of *gross* negligence. The book-keeper deposed to a conversation with a female servant who brought the parcel, which she did not contradict, but merely said that she did not recollect it. It was not considered at the trial that what passed at this conversation limited the responsibility of the defendants. I did not, therefore, put it to the jury to say whether or not they believed that a conversation to the effect deposed to had passed. The book-keeper swore that the woman who brought the parcel said that it was a parcel of consequence; that he asked her if it was a parcel of value; and that she said that it was, but that she did not know what its value was, and that he told her it ought to be insured. These were the words used by the witness. To talk of insurance to a country servant was not the way to inform her what it was proper for her to do. This agent of the defendants should have told the servant, when she said she did not know the value of the parcel, to go back to her master and ask him what the value of his parcel was, that the agent might know what to charge him for the carriage of it; and that, until he knew the risk that his employers were to be answerable for, he would not take charge of the parcel. Instead of this, he took it, and it was lost; and it was the only parcel that was lost. That I might conform to the opinion of the majority of the Court of King's Bench in *Batson v. Donovan* (4 B. & Al. 21), I asked the jury whether the servant or agent of the plaintiff had been guilty of any negligence, or failed in her duty to the carriers. They answered in the negative; and I think their answer was the proper one. As the carrier took the parcel without requiring to know its value, and without insisting that it should be entered and paid for according to its value, he took it without any limitation of his common-law responsibility, and must be answerable for its loss. In *Riley v. Horne*, I was of opinion at the trial, that the notice did not apply to the journey to London. The Court of King's Bench has determined that such a notice applies to the journey back as well as to the journey out. A carriage that returns to a place must have gone from it; and therefore, a notice from the proprietor of coaches going from it may be applied to their return journey. But to give effect to such a notice, it must be proved that the person who sent goods on that same journey knew that the coach came from the George and Blue Boar, London. In this case the plaintiffs had establishments in the country and in London, and were constantly in the habit of sending parcels from London to the country, and from the country to London, by this coach. It is most probable, therefore, that the jury would have found that the plaintiffs knew that the carriage set out from the George and Blue Boar, and that this notice applied to its journey out and home. As I thought that the notice was not so plain and direct as it ought to have been, and therefore did not leave it to the jury to say whether or not the plaintiffs knew that the coach was one that started from the George and Blue Boar, there ought to be a new trial in this case, that the question may be put to the jury. In *Macklin v. Waterhouse*, the rule must be discharged; in *Riley v. Horne*, the rule for a new trial must be made absolute.

See 2 *Barn. & Cress*, 20; 6 *East*, 564; *Taunt.* 144; 1 *Hen. Bl.* 298; 1 *Term Rep.* 27; 2 *B. Moore*, 22; *S. C.* 8; 5 *Barn. & Ald.*

53; *Id.* 247; 16 *East*, 244; 6 *Term Rep.* 17; *Cro. Jac.* 262; 4 *Price*, 31; 2 *Barn. & Ald.* 356; 2 *B. Moore*, 18; *Vidian's Entries*, p. 27; 4 *Bing.* 224; 2 *Carr. & Payne*, 76; 3 *Taunt.* 272; 2 *East* 128; 1 *East*, 106; 5 *East*, 507; 4 *Barn. & Ald.* 592; 13 *Price*, 329; 1 *Esp.* 315.

HELSBY v. MEARS AND OTHERS, E. T. 1826. K. B. 5 *B. & C.* 504; S. C. 8 *D. & R.* 289.

ASSUMPSIT, against common carriers for not delivering a box containing watch-cases. Plea, the general issue. The plaintiff was a watch-case maker at Liverpool. He was accustomed to send watch-cases by the mail-coach of which the defendants were proprietors to one Walker, the assay master at Chester. The box in question was sent on the 15th September, 1824, to Walker, and on the 16th it was sent by the latter to the mail-coach office at Chester, (directed to the plaintiff at Liverpool), which was kept by one of the defendants, who were partners in the Liverpool mail. A notice had been put up in the office, stating that the defendants would not be accountable for any parcel or package of greater value than 5*l.*, unless it was entered and paid for accordingly. It was not so entered and paid for when delivered at the office; and was lost or probably stolen from the office. It was shewn that, three years before, an arrangement had been made by one of the defendants with Walker, that his parcels, though of greater value than 5*l.*, should be carried for the ordinary amount of carriage by the Coventry mail, in which the defendants were also interested. After this arrangement, Walker continued to send his parcels pursuant to it both by the Liverpool and Coventry mails. The account for the carriage was settled annually. Since the arrangement, several of the defendants had become partners in the Liverpool mail, and one had become so subsequently to the last annual settlement at Chester. The jury found that there was a special contract with Walker to carry for him at the ordinary rate of carriage, without insurance, and also that the loss was by a felony. A verdict was entered for the plaintiff; and on shewing cause against a rule nisi for a new trial—

A special agreement by one partner to carry goods on terms different from those specified in the notice binds present and future partners in the firm.

Per Cur.—No doubt common carriers may limit their responsibility by a notice, that they will not be answerable for goods of more than a certain value; but they may, notwithstanding a notice of that description, be bound by a special contract made with any individual. A contract being found by the jury, we have no difficulty in saying, that it would bind all the partners at that time, and all who might afterwards become so, until some notice of an intention to rescind the contract was given to Walker. It does not distinctly appear when the notice was put up. If before the contract, that would take it out of the notice; if subsequently, it was the duty of the partner with whom the contract was made, if it was intended to alter the course of dealing, to give him special notice of that intention. The verdict found for the defendants ought not, therefore, to be disturbed.

3. *Of Notices since 11 Geo. 4 & 1 Will. 4, c. 68*.*

OWEN *v.* BURNETT, H. T. 1834. Ex. 2 C. & M. 353; S. C. 4 Tyrw. 134.

A looking-glass is an article of value in a small compass within the meaning of 11 Geo. 4 & 1 Will. 4, c. 68, s. 1, and, therefore, notice of its value should be given, and an increased payment for its carriage made, or the carrier will not be liable for negligence less than gross negligence.

CASE, against a carrier for negligence in conveying a looking-glass. It appeared that a looking-glass exceeding the value of 10*l.* was packed in a case, and sent to the defendant's office to be conveyed from London to a house near Lymington. A notice was fixed up in the office, pursuant to 11 Geo. 4 & 1 Will. 4, c. 68, s. 2. The words, "plate glass," "looking-glass," "keep this edge upwards," were written on the case, but no declaration was made of the nature and value of the article, and no increased rate of carriage paid. The parcel was conveyed from Lymington to the place of its ultimate destination on a brewer's truck; that being the usual mode in which parcels were conveyed in that part of the country. When the glass was unpacked it was found to be broken. A verdict was found for the plaintiff, damages 37*l.*; and leave was given to move to enter a nonsuit.

Per Cur.—On the language of this act of Parliament, we think a nonsuit ought to be entered. The act was passed for the relief of carriers against the responsibility to which at common law they were liable, and we think it ought to have a liberal construction. It is reasonable that its operation should be general, although only a particular mischief is recited. The enacting clause protects the carrier from liability "for the loss of or injury to any article or articles, or property of the *description following*." Is this an article of the "description following?" Why, "glass" is enumerated amongst those articles, some of which may or must be of a very bulky nature; and it is impossible, therefore, to give the words any operation, unless they be of a very general import. Then comes the provision, that the carrier shall not be liable unless there be a declaration of the value and nature of the article, which declaration, in our opinion, is in the nature of a condition precedent. Here, it seems to us, there was no misfeasance or gross degree of negligence. The negligence imputed was, carrying the glass along a hard smooth road on a truck. If the carrier had been apprised of the contents of the case, it might not have been so prudent a mode of conveyance; but it was the ordinary mode of carriage; and, to induce him to exercise more than ordinary care and diligence, he was entitled to notice. We are, therefore, of opinion that he is not responsible.

See 2 B. & Ad. 356; 6 B. Moore, 469; S. C. 3 B. & B. 177; 4 B. & Ad. 21; 8 T. R. 531; 5 East, 507; 5 B. & Ald. 342; 8 Taunt. 144; S. C. 2 B. Moore, 18.

* See note, p. 473, ante, where the act is set out at length. Under section 1 of the Carriers Act, (11 Geo. 4 & 1 Will. 4, c. 68), there must be an express formal declaration of the value of pictures &c. to the value of more than 10*l.*, sent by a carrier; and it is not enough that the carrier had a conviction as to what the contents of a package were. (*Boys v. Pink*, 8 C. & P. 361). Whether this act protects carriers in cases of gross negligence, and as to what amounts to gross negligence, quære? (Ib.) Hat-bodies, which are made partly of the soft substance which is taken from the skin of rabbits, and partly from the wool of sheep, do not come under the description of furs in the Carriers Act. (*Muyhew v. Nelson*, 6 C. & P. 58).

SYMS *v.* CHAPLIN, M. T. 1836. K. B. 5 *Ad. & E.* 634; S. C. 1 *N. & P.* 129; S. C. 5 *Dowl. P. C.* 429.

ASSUMPSIT, against a carrier for the non-delivery of a parcel containing the plaintiff's certificate as a bankrupt. Pleas—first, non assumpsit; secondly, that plaintiff did not deliver the certificate to defendant modo et formâ; thirdly, that the delivery was since the passing of 11 Geo. 4 & 1 Will. 4, c. 68, and the certificate was of a greater value than 10*l.*; that it was not delivered at a receiving-house of the defendant, and the value of it was not declared, &c. Replication, issue on the first and second pleas, and de injuriâ to the third. At the trial, it appeared that the parcel was sent to the post-master at Bradford, who took parcels for the mail-cart between Bradford and Melksham. The mail-cart took it to Melksham, and delivered it to the landlord of an inn, who kept books for booking parcels for the mail. The latter delivered it to the driver of the defendant's coach, who paid him for the carriage between Bradford and Melksham. It also appeared that the defendant's coach had been in the habit of stopping for two years and upwards at the inn to take in and deliver parcels, but not to change horses. Other coaches did the same. The innkeeper had no express authority from the defendants to book parcels for them. No notice was put up in his office, or in that of the post-master at Bradford, as to the increased rate of charge for parcels above 10*l.* value permitted by the 11 Geo. 4 & 1 Will. 4, c. 68, s. 2. It was proved, that the value of the certificate exceeded 10*l.*, and that it was lost. The jury found that the inn at Melksham was a receiving-house of the defendant. A verdict was found for the defendant, with 20*l.* damages, and liberty was given to move to enter a nonsuit.

Per Cur.—The jury were correct in finding that the inn at Melksham was a receiving-house of the defendant. The person who received the parcel at Bradford did not contract to convey it to London, but merely to forward it to Melksham. Having conveyed it there, his responsibility ceased. If so, the driver of the mail-cart to Melksham was the agent of the plaintiff for the purpose of delivering it by the coach which was to take it to London, and the inn being the receiving-house of that coach, the innkeeper is the servant of the defendant for the purpose of accepting that parcel. The question then is, whether, upon the third plea, the plaintiff was entitled to recover, and we think he was, the jury having found that the parcel was taken in at a receiving-house of the defendant. Then the question is, whether the defence, which was suggested under that plea, that the value was not declared, can be made available under the plea of non assumpsit. *Owen v. Burnett*, (2 C. & M. 353; S. C. 4 Tyrw. 133), which was referred to in moving, was decided before the new rules of pleading. Since the new rules, we think that this defence cannot be admitted under the plea of non assumpsit. No rule can, therefore, be granted.

See 2 C. & M. 353; S. C. 4 Tyrw. 133.

An inn at which a coach is used to call for parcels booked to be carried by it or other coaches also calling there, is a "receiving-house" within the meaning of 11 Geo. 4 & 1 Will. 4, c. 68, s. 5; and the defence, that the value has not been declared pursuant to section 1 of that statute, is not available under "non assumpsit," but, since the new rules, must be specially pleaded.

Silk dresses made up for wearing are not "silks" within the meaning of the Act; nor is an eye-glass, with a gold chain attached to it for the purpose of its being hung round the neck of the wearer, "trinkets" within the meaning of that enactment. (*Davey v. Mason*, 1 C. & M. 45).

BOYCE v. CHAPMAN, M. T. 1835. C. P. 2 Bing. N. C. 222; S. C. 2 Scott, 365.

On an issue raised by a plea under 11 Geo. 4 & 1 Will. 4, c. 68, s. 8, that a parcel had been stolen by a carrier's servant, circumstances hardly warranting a conviction if the servant had been tried, were proved by plaintiff; but defendant did not call the servant. The Court refused to disturb a verdict found for the plaintiff.

CASE, against a coach proprietor for the loss of a parcel containing money and notes. Pleas—first, not guilty; secondly, no declaration of value and payment of increased rate of charge pursuant to 11 Geo. 4 & 1 Will. 4, c. 68, s. 1. Replication, issue on the first plea; and to the second, under section 8 of the same statute, that the loss arose from the felonious act of the defendant's servant. At the trial, it appeared that, on the 22nd of August, 1834, the plaintiff's traveller made up the parcel, and delivered it to the guard of a coach to forward to Birmingham from Knutsford. He booked it at the defendant's coach-office in Knutsford, but gave no intimation of its contents. The parcel was never afterwards heard of. In June, 1835, a 10*l.* note, part of the contents of the parcel, was stopped at the Bank of England, and afterwards traced to the possession of the landlady of the hotel at Birmingham, in the yard of which the coach-office was situated. Evidence was given to shew the manner in which she had become possessed of it, the effect of which was, that, on the 22nd June, 1835, a traveller staying at the hotel, wishing to procure a 10*l.* note for a 5*l.* note and five sovereigns, gave the latter to the waiter, who handed them to a person named Matthews, one of two porters employed at the defendant's office at the time of the loss; Matthews went out, and shortly afterwards returned with the 10*l.* note in question, which was given to the guest, *who paid his bill with it the next morning*. On the part of the defendants, a person named Arthur, clerk to a tradesman in the town, was called. He proved that Matthews came to his employer's shop to get a 10*l.* note for a 5*l.* note and five sovereigns; but, on the stolen note being shewn to him, he said he *thought* it was not the note he had given to Matthews. It was thereupon contended, on the part of the plaintiff, that Matthews had substituted the stolen note for that which he had received from the witness Arthur. The jury found for the plaintiff.

Per Cur.—It appears that the parcel was stolen in August, 1834, and that ten months afterwards one of the notes that had been contained in it was found in the possession of a person who was in the employ of the defendants at the time of the felony. That, we must acknowledge, was, under the circumstances, but very slender evidence whereon to charge Matthews with the theft. But observe how different the two cases are; if he were indicted for it, Matthews's explanation of the transaction would not be evidence; here it would have been. The defendants had every ground for relying upon his testimony. Who so well as he could have told whether the note in question was that which he had received from Arthur, or a substituted one? As, therefore, there was some evidence for the jury, and there was testimony in the power of the defendants to produce, which was not produced, we think there is no sufficient ground to warrant us in granting a new trial.

II. CARRIERS BY WATER.

BISHOP *v.* MACINTOSH, H. T. 1824. K. B. 2 B. & C. 556; S. C. 4 D. & R. 42.

ASSUMPSIT, for not delivering stores which defendant had undertaken to deliver by his vessel at New South Wales, unless prevented therefrom "by inevitable accident." Plea, general issue. The question at the trial was, whether the detention by the customs' officer at Ramsgate, in consequence of an alleged overloading of passengers, contrary to 43 Geo. 3, c. 58, s. 2, was an "inevitable accident." This depended on the construction of that section. The words of it are:—"That it shall not be lawful to convey from any place in the United Kingdom, to any parts beyond sea, in any ship, a greater number of persons, whether adults or children, including the crew, than in the proportion of one person for every two tons of the burthen of such ship or vessel; and every such ship or vessel shall be deemed and taken to be of such tonnage or burthen as is described and set forth in the respective certificate of the registry of each and every such ship; and if any such ship or vessel shall be partly laden with goods, wares, or merchandize, then it shall not be lawful for the master to receive or take on board a greater number of persons, including the crew, than in the proportion of one person for every two tons of that part of such ship or vessel remaining unladen; and such goods, wares, and merchandize shall, at the sight and under the direction of the collector or comptroller, or other officer of the customs, at the port or place where such goods, wares, or merchandize shall be taken on board, be stowed and disposed of in such manner as to leave good, sufficient, and wholesome accommodation for the proportion of persons thereby allowed in such case to be received on board." The defendant's ship's registered tonnage, as appeared by the certificate, was 230 tons, but she measured 269. She had both passengers and merchandize on board. The jury found for the plaintiff; on moving for a new trial—

Per Cur.—The sound construction of the act is, that all vessels, whether partly laden or not, shall be deemed to be of the burthen mentioned in the certificate of registry.

SIORDET *v.* HALL, E. T. 1828. C. P. 1 M. & P. 561.

ASSUMPSIT, against the owner of a steam-vessel for an injury done to certain indigo shipped by the plaintiff on board a steam-vessel, to be conveyed to Antwerp. The bill of lading contained the usual exceptions of "the act of God," "the dangers of the seas," &c. It appeared that the indigo had been shipped on the 10th February, 1827, and that the vessel was tight, staunch, and strong. The captain expecting to receive orders to sail the following morning pumped the boiler full of water that night. It was proved that it required two hours to pump the boiler full, and two or three hours to heat it before the steam rose sufficiently. It was also shewn to be usual to fill the boiler on the day previous to the vessel's departure. On the night of *Sunday*, the 11th, the vessel was surveyed, and every thing was found perfectly safe; but, on the following morning, a considerable quantity of water was found in the hold, and, on pumping it out, it was ascertained that the blow-pipe,

The certificate of registry is conclusive as to the tonnage of a vessel in determining the number of passengers she is entitled to carry pursuant to the 43 Geo. 3, c. 56, s. 2, though she has both passengers and goods on board.

Goods having been placed on board a steamer for conveyance, the frost caused the water-pipe of the boiler to burst, the latter having been filled unnecessarily soon, and the goods were injured by the water; the owner of the steam-vessel was held liable, although the bill of lading

contained the usual exception of "the act of God," &c.

or filling-pipe of the boiler, had burst during the night, owing to the action of frost upon it. The jury found a verdict for the plaintiffs.

Per Cur.—Every one knows that frost will crack iron, and that, if water be contained within it, it is the more liable to do so. The question then is, whether, by the custom or usage applicable to steam-vessels, the master is justified in keeping the boiler full of water in frosty weather, two days before the vessel starts; or whether the owners of goods on board are to suffer, merely because it might occasion the master a little extra trouble to let the water out of the boiler on a frosty evening, and fill it the next morning. The jury were in full possession of the facts, and it appears to us that their verdict is perfectly right*.

See Abbott on Shipping, by Shee, Serjt.; 1 T. R. 27.

DAVIS v. GARRETT, T. T. 1830. C. P. 6 Bing. 716; S. C. 4 M. & P. 540.

The law implies a duty on the part of a carrier by water, whether in a general vessel or one hired for a specific voyage, to proceed without unnecessary deviation in the usual and customary course; and if he unnecessarily deviates, he is answerable for any injury accruing to the cargo from a storm arising during the deviation.

CASE, against the owner of a barge for the loss of goods caused by a deviation, on the part of the master, from the ordinary course of the voyage. It appeared at the trial that the barge had deviated from the usual and accustomed course of the voyage in question, from Bewley Cliff to the Regent's Canal, having gone by the East Swale round the south side of the Isle of Sheppy, the shortest and most usual course being round the other side of the island; and that, whilst the barge was in Whitstable Bay, she encountered a storm, whereby the lime on board was wetted and consequently heated, and the barge caught fire, and the master was compelled, for the preservation of himself and the crew, to run the barge on shore, where both the lime and the barge were lost. The jury found a verdict in favour of the plaintiff. A rule for a new trial was obtained, and cause shewn against it.

Per Cur.—There are two points for the determination of the Court upon this rule; first, whether the damage sustained by the plaintiff was so proximate to the wrongful act of the defendant as to form the subject of an action; secondly, whether the declaration is sufficient to support the judgment of the Court for the plaintiff. We think the real answer to the first objection is, that no wrongdoer can be allowed to apportion or qualify his own wrong; and that, as a loss has actually happened while his wrongful act was in operation and force, and which is attributable to his wrongful act, he cannot set up as an answer to the action the bare possibility of a loss, if such wrongful act had never been done. It might admit of a different construction if he could shew, not only that the same

* In an action against the proprietors of a steam-vessel, to recover compensation for damage done to goods sent by them as carriers, if, on the whole, it be left in doubt what the cause of the injury was, or, if it may as well be attributable to perils of the seas as to negligence, the plaintiff cannot recover; but if the perils of the seas required that more care should be used in stowing the goods on board than was employed on them, that will be negligence for which the owners of the vessel will be answerable. (*Muddle v. Stride*, 1840, 9 C. & P. 380).

Whether, in such a case, on the arrival and detention by foul weather of the vessel at a place from which the goods could be conveyed by land to their destination, the captain of the vessel is bound to give notice to the consignee of the fact, to enable him, if he think proper, to obtain the goods earlier by sending for them.—*Quære?* (*Muddle v. Stride*, 1840, 9 C. & P. 380).

loss *might* have happened, but it *must* have happened, if the act complained of had not been done; but there is no evidence to that extent in the present case. Upon the objection taken in arrest of judgment, the defendant relies on the authority of the case of *Max v. Roberts*. (12 East, 89). We think there is a distinction between the language of this record and that of the case referred to. In the case cited, the allegation was, that it was the duty of the defendant to carry the goods directly to Waterford; but here, the allegation is, "that it was his duty to carry the lime by and according to the direct, usual, and customary way, course, and passage, without any voluntary and unnecessary deviation and departure." The words "usual and customary" being added to the word "direct," more particularly where the breach is alleged in "unnecessarily deviating from the usual and customary way," must be held to qualify the meaning of the word "direct," and substantially to signify that the vessel shall proceed in the course usually and customarily observed in that her voyage: and we cannot but think that the law does imply a duty in the owner of a vessel, whether a general ship or one hired for the special purpose of the voyage, to proceed without unnecessary deviation, in the usual and customary course.

See 12 East, 89; 4 Camp. 112; *Abbott on Shipping*, by Shee, Serjt.; 1 Wils. 282; 2 N. R. 365.

SISSONS v. DIXON AND OTHERS, T. T. 1826. K. B. 5 B. & C. 758; S. C. 8 D. & R. 526.

CASE, against the defendants as common carriers, for the loss of a parcel. Plea, the general issue. A parcel of lace was proved to have been delivered in Dublin to the defendants, who were the proprietors of a steam-packet plying between Dublin and Liverpool, to be conveyed to the latter place. The parcel was not delivered. On the part of the defendants, it was contended that, in order to entitle himself to recover, the plaintiff was bound to shew that the goods in question had been duly entered according to the provisions of the 46 Geo. 3, c. 87, s. 1. The point was reserved, and the plaintiff had a verdict. On shewing cause against a rule for entering a non-suit—

An objection by a carrier, that he is not liable, the goods in question not having been properly customed, must be proved by him, as the presumption of law is in favour of legation.

Per Cur.—The presumption always is that a party complies with the law. If the fact was as suggested by the defendant in this case, the means of proving it were in his power. No proof to that effect having been given, that ground of defence fails. The present rule must be discharged.

See 4 Camp. 183; 3 East, 192; 11 East, 180, 300; 1 B. & P. 264; 1 B. & Ald. 461; 5 B. & C. 38.

GATCLIFFE v. BOURNE, H. T. 1838. C. P. 4 Bing. N. C. 314; 5 Scott, 667.

ASSUMPSIT, against the owner of a steam-vessel for the loss of goods sent by it from Belfast to Dublin and thence to London. The defendant pleaded, that, after the arrival of the said steam-vessel at London aforesaid, with the said goods and merchandize on board thereof, as in the first count mentioned, to wit, on &c., the defendants caused the said goods and merchandize (except the part thereof in that count alleged to have been delivered to the plaintiff) to

It is no answer to an action against the owner of a steam-boat for non-delivery of goods delivered to him, to be carried from

one port to another, that he delivered them at a wharf, and that they were afterwards destroyed by fire, unless it is shewn that the custom of the port of delivery was to deliver at a wharf.

be unshipped therefrom, and safely and securely landed and deposited in such like good order and condition as aforesaid, in and upon a certain wharf, called Fenning's Wharf, at the said port of London, there to remain until the same could be delivered to the plaintiff or his assigns, according to the tenor and effect of the said bill of lading, the said wharf before that time and then being a place at which goods conveyed in steam-vessels from the port of Dublin to the port of London were, on their arrival at the last-mentioned port, used and accustomed to be landed and deposited for the use of the consignees thereof, and a place fit and proper for such purposes. That, afterwards, and whilst the said goods and merchandize (except as aforesaid) remained and were deposited upon the said wharf for the purposes aforesaid, and before a reasonable time for the delivery thereof, according to the tenor and effect of the said bill, had elapsed, to wit, on &c., the same goods and merchandize (except as aforesaid) were, together with divers other goods and merchandize then being upon the said wharf for the like purposes, wholly consumed and destroyed by a fire which then happened and broke out by accident, by means whereof, and from no other cause, and without any carelessness, negligence, or improper conduct, or want of due care in the defendants or their servants in that behalf, the defendants were hindered and prevented from delivering the said goods and merchandize (except as aforesaid) to the plaintiff.

Per Cur.—We hold this plea bad, if for no other reason, at all events for this, that it leaves the matter in uncertainty whether the plaintiff was not compelled against his will to receive his goods from a wharf, when there is no allegation that such is the usual practice observed in the port of delivery.

See 1 *T. R.* 27; 2 *Esp.* 693; 1 *Wils.* 281; 1 *Gale*, 17; 3 *Wils.* 429; 2 *W. Bl.* 916; 4 *Bing.* 476; 5 *T. R.* 389; 4 *T. R.* 581; *Abbott on Shipp.* 250; *Peake*, 150; 3 *T. R.* 307; 4 *T. R.* 260.

III. REMEDIES AGAINST CARRIERS.

(a) PARTIES TO SUIT*.

FREEMAN v. BIRCH, E. T. 1833. K. B. 1 *N. & M.* 420.

A laundress, who has sent linen by a carrier to her customer, may maintain an action for its loss†.

CASE, against a carrier for negligence in conveying linen. It appeared that the plaintiff was a laundress, and sent the linen, which belonged to one of her customers, by the defendant's cart. In the course of the journey it was lost. The action, it was contended, should have been brought by the customer of the plaintiff, and not by her, as the former was the owner of the parcel. The objection was overruled, and the plaintiff had a verdict. On a motion for a new trial—

Per Cur.—In this case, the laundress retained a special property

* When goods are forwarded for sale on approval, the consignor is the party to sue the carriers for the loss of the goods. (*Swain v. Shepherd*, 1832, 1 *Moo. & Rob.* 220).

† If a parcel is given to a waggoner for him to carry for his own gain, and not for the profit of his master, the master is not liable in case the parcel be lost. (*Butler v. Basing*, 1827, 2 *C. & P.* 648).

in the goods; it is therefore distinguishable from those cases in which the property has entirely gone out of the vendor. In the case of vendor and vendee, if the goods are, while the carrier has the care of them, to be at the risk of the vendor, he must bring the action against the carrier. In ordinary cases, the vendor employs the carrier as the agent of the vendee. No rule can be granted.

See Selw. N. P. 405; *3 B. & P.* 584; *1 T. R.* 659; *8 T. R.* 330; *5 Burr.* 2680; *2 Camp.* 639.

NEWBERRY v. COLVIN, *M. T.* 1830. *Ex. Chamb.* 7 *Bing.* 190; *S. C.* 4 *M. & P.* 876.

CASE, against the defendants below as owners of the ship *Benson*, for the loss of goods which had been shipped by the plaintiffs below in India, for the purpose of being conveyed to England. Plea, not guilty. The jury found a special verdict, which was in substance as follows:—By a charter-party, the owners of the vessel in question appointed one George Betham master of it, and agreed that he should be at liberty to receive a cargo on board, (reserving 100 tons to be laden by the owner), and to proceed therewith to Calcutta, and there reload the ship with a cargo of East India produce, and return therewith to London; and upon his arrival there and discharge, the intended voyage and service should end. It was further agreed that the owner should supply the ship with stores, and that it might be retained in the service twelve months, or so much longer as was necessary to complete the voyage. In consideration of the premises, George Betham agreed to take the command, to receive the ship into his service for twelve months certain, and such longer time as might be necessary to complete the voyage, and pay to the owners for the use and hire of the ship after the rate of 25*s.* per ton per month, of which 1000*l.* were to be paid on the execution of the charter-party; and it was also agreed that Betham should remit all freight-bills for the homeward cargo to Messrs. Baxter & Co., to hold as trustees for Betham and the owners. Their proceeds were to be applied in payment of the freight, and the balance paid over to Betham. It was moreover covenanted that the owner should have an agent on board, with sole power to manage the ship's stores, and to displace Betham for breach of any covenant contained in the charter-party, and appoint another commander. The plaintiffs below, who resided at Calcutta, were aware of this instrument and its contents, and they shipped on board certain goods at Calcutta for London, but which were never delivered there. The Court of King's Bench (8 *B. & C.* 166; *S. C.* 2 *M. & R.* 47) gave judgment in favour of the plaintiff below, and the record was removed by writ of error into the Court of Exchequer Chamber. The case having been argued—

Tindal, C. J., delivered the judgment of the Chamber. In this writ of error, the sole question appears to be, whether, upon the legal construction of the charter-party set out at length in the special verdict, the defendants below were the owners of the vessel called the *Benson*, at the time the contract for the carriage and conveyance of the goods in question was made; or whether, on the contrary, Betham, the captain and freighter of the vessel, became *pro tempore* the owner thereof: for, the present action, although in form an action upon a tort, is virtually and substantially an action upon the contract contained in the bills of lading, and set out in the declara-

If, from the terms of a charter-party, taken altogether, it appears to have been the clear intention of the owners to let a vessel for a certain period to a charterer, it is not material that the owner appoints the charterer as master, and retains power to dismiss him; and therefore, in case of a loss of goods shipped by a person knowing of the charter-party, an action cannot be maintained against the owner.

tion. Upon the whole, we think the effect of this charter-party was to make the freighter the legal owner of this ship pro tempore; that the freight for the carriage of these goods was paid to him for his own use; and consequently, that the defendants below are not liable to an action for the non-delivery of the goods. We think, therefore, that the judgment of the Court of King's Bench must be reversed.

See Abbott on Shipping, by Shee, Serjt.; 2 Camp. 482; Cowper, 143; 7 Taunt. 627; Co. Litt. 45, b.; 1 Leon. 136.

(b) PLEADINGS*.

1. Declaration.

POZZI v. S. AND M. SHIPTON, M. T. 1838. K. B. 8 A. & EL. 963; S. C. 1 P. & D. 4.

Where a declaration in case charged it to be the duty of certain persons to convey goods for hire, but did not describe them as common carriers, it was held that, after verdict against one, it was too late to object that the declaration should have been supported by evidence of a joint contract, as after verdict it must be read, as founded on the custom of the realm, and therefore as framed in tort.

CASE. The declaration alleged the delivery of a package containing a looking-glass to the defendants, to be carried from Liverpool to Birmingham, for reasonable reward; and thereupon it became the duty of the defendants to take due care of the package and its contents; yet the defendants, not regarding their duty, so negligently conducted themselves in the premises that the glass was broken. Pleas—1st, not guilty; 2nd, denying the delivery and receipt of the package modo et formâ. At the trial, the evidence shewed that the defendant, M. Shipton, had never been in partnership with the other defendant, and no evidence of a contract was given. It was shewn that S. Shipton was a common carrier. Leave was given to move to enter a nonsuit. A verdict was found in favour of the plaintiff for 9*l.* 9*s.* against S. Shipton, and in favour of M. Shipton. After cause had been shewn against a rule for entering a nonsuit—

Per Cur.—The form of the declaration is in case, and differs from that used in *Bretherton v. Wood* (3 B. & B. 54) in this, that it contains no positive averment that the defendants were carriers; whereas, in *Bretherton v. Wood*, there was an averment that the defendants were proprietors of a stage-coach for the carriage and conveyance of passengers for hire from Bury to Bolton. The present declaration states simply that the plaintiff delivered to the defendants, and the defendants received from the plaintiff, goods to be carried for hire from A. to B. It is therefore consistent with the defendants being common carriers, or being hired on the particular occasion only. Upon the trial, it was proved satisfactorily that the defendants against whom the verdict was found were common carriers; and it does not appear to have been objected, at that time, that proof of an express contract between the plaintiff and the defendants was necessary in order to sustain the declaration. If such proof was not necessary, it can only be because the declaration may be read as founded on the general custom of the realm; and if it may be so read, the Court after verdict must so read it; and then the case of *Bretherton v. Wood* is directly in point in favour of the plaintiff. Upon consideration, we are of opinion that the declara-

* In stating the *termini* of the journey in declaring against a carrier, the word London will be taken as a nomen collectivum, including all that is commonly so called, and not the city merely. (*Beckford v. Crutwell*, 1832, 5 C. & P. 242).

tion may be so read. The practice appears to have been in former times to set out the custom of the realm; but it was afterwards very properly held to be unnecessary so to do, because the custom of the realm is the law, and the Court will take notice of it; and the distinction has for many years prevailed between general and special customs in this respect. Afterwards, the practice appears to have been to state the defendants to be common carriers for hire, totidem verbis. That, however, was departed from in *Bretherton v. Wood* to a considerable extent, and certainly still farther upon the present occasion. It may be that the present declaration could not have been supported on special demurrer for want of some such averment; but on this point we are not called upon to give any opinion. It does not state that the goods were delivered to the defendants at their special instance and request, nor contains any other allegation necessarily applicable to any express contract only, or even pointing to any express contract. We cannot therefore say that it shews the action to be founded on contract; and it is sufficient for the present purpose if the language in which it is couched is consistent with its being founded on the general custom as to carriers. Taking this declaration, therefore, to charge the defendants as common carriers, it follows that it is strictly an action on the case for a tort, and that one of several defendants may be found guilty upon it, according to the doctrine established in *Bretherton v. Wood*. The evidence warrants the verdict which has been found, and we cannot disturb that verdict. We purposely abstain from giving any opinion whether the doctrine in *Govett v. Radnidge*, (3 East, 62), or that in *Powell v. Layton*, (2 N. R. 365), be the true doctrine, as we do not feel ourselves called upon to decide between them, supposing them to differ.

See 3 East, 62; 2 N. R. 365, 454; 12 East, 452, 89; 6 Mau. & Sel. 385; S. C. 2 Chit. R. 1; 1 Wils. 281; 2 Ld. Raym. 909; 3 B. & B. 54; 1 T. R. 274; 6 T. R. 369; 2 Wils. 319; 3 Wils. 348; 1 Wms. Saund. 291 b, n. 4; 2 Marsh. 485; 3 Lev. 258; S. C. 2 Salk. 440; 1 Show. 29; 8 T. R. 186, 335; 1 B. & Ad. 415; 7 Bing. 513.

ANSELL v. WATERHOUSE, T. T. 1817. K. B. 6 Mau. & Sel. 385; S. C. 2 Chitt. Rep. 1.

THE plaintiff declared against the defendant as the proprietor of a common stage-coach, for the negligent conduct of himself and his servant, whereby the plaintiff's wife, while a passenger on the said coach, was injured, the coach being overturned. The defendant pleaded in abatement the non-joinder of several co-proprietors of the coach. Demurrer, on the ground that the declaration was in tort, and not for a breach of contract; and therefore the non-joinder of other persons could not be pleaded in abatement.

Per Cur.—The practice of declaring against common carriers on the custom of the realm is as ancient as the law itself, and was uniformly adopted, until about the time of *Dale v. Hall*. The advantage of proceeding on the custom of the realm is, that the plaintiff may sue one or more of several tort-feasors; for in tort all parties need not be joined. In the present declaration there is not one word sounding in contract. The defendant, it is said, is not charged verbatim as a common carrier upon the custom; but the declaration is tanta-

Where a plaintiff declared against the proprietor of a common stage-coach for negligent driving, whereby an injury was caused to plaintiff's wife, it was held to be in tort, and the non-joinder of other proprietors not pleadable in abatement.

mount, for it charges him as the proprietor of a common stage-coach for hire, and alleges the negligence as a breach of duty arising out of the employment for hire. Being in substance an action founded on the custom of the realm in tort, one of the consequences is that the plaintiff has his election to proceed against all or any of the parties liable. Judgment must therefore be for the plaintiff.

See 6 *T. R.* 373; 8 *T. R.* 186, 335; 3 *East*, 62; 12 *East*, 89, 452; 2 *Wils.* 319; 2 *N. R.* 365, 454; *Cro. Jac.* 610; *Carth.* 150; *Skin.* 291, *pl.* 2; *Selw. N. T.* 408, *n.*; 7th edit. 1 *Wms. Saunders*, 291 *d. n.* 4.

PICKFORD *v.* THE GRAND JUNCTION RAILWAY COMPANY, E. T.
1841. *Ex.* 9 *D. P. C.* 766; *S. C.* 8 *M. & W.* 372.

A declaration against a common carrier for not conveying goods when required so to do, need not allege an actual tender of the money for the carriage, if it alleges that the plaintiff was ready and offered to pay a reasonable sum for the carriage of the package.

CASE. The declaration stated that the defendants were common carriers of goods and chattels for hire from Liverpool to Birmingham, and that the plaintiff caused to be tendered to the defendants, being such carriers, a certain package containing goods not exceeding a certain weight, to be carried and conveyed by the defendant from Liverpool to Birmingham for certain reasonable hire and reward to them in that behalf; and although the plaintiff was then ready and willing, and offered to pay the defendants a reasonable sum for the carriage of the said package, whereof the defendants had notice; yet the defendants, not regarding their duty as such carriers, refused to carry or convey the same. Special demurrer, on the ground that the declaration should have alleged an actual tender of the charges for the carriage of the goods.

Per Cur.—Both parties admit that the defendants are bound, in their character of common carriers, to carry goods; but it is contended, on one side, that they are not bound to carry, except for ready money. There is no doubt a person may maintain an action against a carrier for refusing to carry; but then the question is, whether it is necessary to allege in the declaration a strict tender, or whether it is not enough to aver a readiness and willingness and offer to pay. The Court have considered the question, and are of opinion that this is not like a tender which is applicable only to the case of a previous duty imposed upon the party tendering the money. A tender is, in truth, a payment so far as the debtor is concerned; for he can do no more, unless the creditor will receive the money. In that sense, no tender is required in the present case. Here are contemporaneous acts; and, according to the authority of *Rawson v. Johnson*, it is sufficient in that case to be ready and willing to pay the money when the other party is ready and willing to do the contemporaneous act. We therefore think this averment in the declaration sufficient, and that the plaintiff is entitled to judgment; but the defendants may have liberty to amend on payment of costs. Judgment for the plaintiff.

See 9 *Co.* 87 *b.*; 1 *Show.* 327; 1 *Wms. Saund.* 312 *c.* (2); 7 *East*, 244; 1 *East*, 203; 1 *Marsh*, 413; 1 *Moore*, 56; 7 *Taunt.* 314; 2 *B. & P.* 447.

2. *Plea**.

WYLD v. PICKFORD, T. T. 1841. Ex. 8 M. & W. 443.

CASE against carriers. The first count stated a delivery to the defendants, at their request, of a case containing certain maps, to be carried &c., and alleged a receipt thereof by the defendants; whereby it became their duty to take due and proper care thereof; but that they did not take due and proper care of them, whereby the goods were lost. The second count was in trover. Plea, to the first count, that at the time of the delivery of the case and its contents, the defendants were common carriers for hire, and then gave notice to the plaintiff, who then had notice and knowledge that the defendants would not be responsible for the loss of or damage done to certain goods and chattels delivered to them for the purpose of carriage, and amongst others maps and packages, or otherwise, unless the same were insured according to their value, and paid for at the time of delivery; that the said case was the package in which the said maps were contained; that they received the case and maps to be carried as aforesaid upon the terms and conditions of the said notice, and upon no other terms whatsoever, of which the plaintiff at the time of the delivery had notice, and that the maps were not at the time of the delivery insured according to their value, or paid for. To the count in trover there was a similar plea, alleging the conversion to have been by a mis-delivery through mistake and inadvertence. The plaintiff demurred specially to both pleas.

Per Cur.—We agree, that if the notice furnishes a defence, it must be either on the ground of fraud, or of a limitation of liability by contract; which limitation it is competent for a carrier to make, because, being entitled by common law to insist on the full price of carriage being paid beforehand, he may, if such price be not paid, refuse to carry upon the terms imposed by the common law, and insist upon his own; and, if the proprietor of the goods still chooses that they should be carried, it must be on those terms; and probably the effect of such a contract would be only to exclude certain losses, leaving the carrier liable as upon the custom of England for the remainder. It seems to us, however, that in the present case there is a sufficient allegation in both the pleas of such a special contract. In an action on the case for breach of a duty arising ex contractu upon a bailment or otherwise, it is not necessary to state

If a declaration in case against a carrier for mis-delivery is general in its terms, and a notice is pleaded, it is unnecessary to allege that the loss was not occasioned by negligence for which the defendant is liable notwithstanding the notice, that being properly the subject of a new assignment.

But, if a plea to a count in trover states, that the loss was occasioned by a mis-delivery through mistake and inadvertence, it is bad, and the plaintiff need not new assign gross negligence.

* See s. 5 of 11 Geo. 4 & 1 Will. 4, c. 68, as to pleas in abatement, ante, p. 474; and s. 10, as to payment into Court, ante, p. 475, note. By the Pleading Rules of Hil. T., 4 Will. 4, under the head of "Pleadings in particular Actions," title, "In Case," it is ordered, "In this form of action against a carrier, the plea of not guilty will operate as a denial of the loss or damage, but not of the receipt of the goods by the defendant as a carrier for hire, or for the purpose for which they were received." And under title "Assumpsit" it is ordered, "In actions against carriers and other bailees, for not delivering or not keeping goods safe, or not returning them on request, and in actions against agents for not accounting, the plea (of non assumpsit) will operate as a denial of any express contract, to the effect alleged in the declaration, and of such bailment or employment as would raise a promise in law to the effect alleged, but not of the breach." In *Syms v. Chaplin*, (5 Dowl. P. C.; S. C. 5 Ad. & El. 634; 1 N. & P. 129, ante, p. 485), it was held that the defence, that the value of goods sent by a carrier was not declared at the time of delivery, pursuant to 11 Geo. 4 and 1 W. 4, c. 68, is not available under the plea of non assumpsit, but must be specially pleaded.

the contract with the same forms as in an action of assumpsit. The usual mode is to aver, as is done here, that the goods were delivered by the plaintiff to the defendant, and had and received by the defendant, to be kept or carried, or dealt with in a particular way. In this plea, there is an averment, after the allegation of the notice and knowledge thereof by the plaintiff at the time of the delivery of the goods to the defendants, that they accepted and received the goods from the plaintiff, to be carried and conveyed, subject to and under and upon the terms and conditions of the notice, and upon no other terms whereof the plaintiff then had knowledge and notice. It is objected, that there is no express averment that the plaintiff consented to those terms; but, assuming that he did not, the defendant did not accept the goods on any other, and the plaintiff is in this difficulty, that he cannot enforce the defendant's obligation as a common carrier, with all the obligations of that character, because he was not ready to pay the price of carriage beforehand, and if he sue as on a bailment to the defendants on special terms, it must be a bailment on those terms on which alone the defendants have agreed to accept the goods. Another objection was, that the plea ought to have gone on to allege that the loss was not occasioned by such negligence as the defendants were responsible for, notwithstanding the terms on which they accepted the goods. We think that the proper answer to this objection was given, viz. that such negligence should have been replied, or more properly speaking, newly assigned. Then as to the plea to the count in trover; if any conversion by non-delivery or a negligent conversion would be a misfeasance for which the defendants would be liable notwithstanding the notice, the plea would be bad; if a mere inadvertent conversion, it would not. There is a difficulty in supporting this plea, on the construction which we think we ought to put upon the terms of the notice on which the goods were received; for the plea admits a conversion by inadvertent delivery, and does not excuse that, since the carrier is not by such notice made irresponsible for every mistake or inadvertent delivery, but only for such as were made without negligence, whether gross or ordinary, and a delivery may be even grossly negligent which is inadvertent. And this is not a case for a new assignment, for the plea shews that the defendants know for what the plaintiff is proceeding, viz. the mis-delivery, but does not give an answer to that.

See 5 East, 428; 4 Price, 31; 5 B. & Al. 53, 342; Peake's N. P. C. 49; 2 B. & Al. 702, 356; 4 T. R. 260; 8 T. R. 531; 16 East, 241; 5 Bing. 217; 2 M. & P. 331; 8 Taunt. 144; 2 Moore, 18; 2 Ad. & El. 634; 1 N. & P. 129; 4 B. & Al. 21; 4 Burr. 2248; 3 Taunt. 264; 5 B. & C. 322; 8 D. & R. 223; 2 B. & Al. 356; Yelv. 225; 8 Ad. & El. 973; 1 P. & D. 4; 3 Brod. & B. 54; 4 B. & Al. 30; 3 Brod. & B. 182.

(c) EVIDENCE*.

* Evidence, that at the door of a booking-office there is a board on which is painted, "Conveyances to all parts of the world," and a list of names of places, is not a sufficient proof that the owner of the office is a common carrier, so as to charge him with the loss of a box which was booked there. (*Upston v. Stark*, 1827, 2 C. & P. 598). In an action against the carrier, the person at the booking office who delivered the goods to the carrier is a competent witness to prove the

CAVINS v. ROBINS, E. T. 1841. Ex. 8 M. & W. 258.

ASSUMPSIT against a carrier for the value of a package which it was alleged in the declaration was "to be by the defendants safely and securely kept for the plaintiff for certain reasonable compensation and reward." In March, 1837, two packages were sent from Chorley, in Lancashire, by a waggon of the defendants, who are common carriers, directed to the plaintiff in London. They were delivered accordingly to the plaintiff, who sent them back to the defendants' warehouse, with directions that they should remain there to await his orders. They remained there for more than a year, until one of them was lost out of the warehouse. To recover the value of that package this action was brought. One of the printed bills issued by the defendants, which had been delivered to the plaintiff with the goods, was put in. The heading of it contained a notice, that, "any goods or packages that shall have remained three months in the warehouse without being claimed, or on account of non-payment of the charges thereon, will be sold to defray the carriage and other charges thereon, or the general lien, as the case may be, together with warehouse rent and expenses." One of the witnesses, a servant of the defendants, stated, that it was not the practice of the defendants to charge their customers with warehouse rent; that they considered the carriage of the goods as a sufficient remuneration for the warehouse room also. The jury found for the plaintiff. On a motion to enter a verdict for the defendant or for a new trial—

Per Cur.—The only question is, whether the allegation, that these goods were delivered to the defendants to be safely kept by them for a reasonable reward in that behalf, has been proved. It appears to us, that there was evidence whence the jury might reasonably find, that, in consideration that the parties whose goods were carried would pay a certain sum, the defendants would not only carry them, but would warehouse them for three months; the compensation so paid being a compensation, not only for carrying but for warehouse rent also.

See 4 T. R. 581; Story on Bailments, 290, (Edit. 1839).

state in which they were delivered. (*Colepepper v. Good*, 1832, 5 C. & P. 380). In an action against carriers for loss of a parcel, the consignee's shopman not knowing of the delivery, and believing that he must have known it if a delivery had taken place, is *prima facie* evidence of non-delivery. (*Griffiths v. Lee and Others*, 1823, 1 C. & P. 110). If in an action against a carrier it appear that the agent of the plaintiff went to the carrier's booking-office, and desired that a man should be sent to the agent's house to fetch a package, and bring it to the booking-office, and one of the carrier's men accordingly fetched the package from the agent's house, this is a delivery by the plaintiff to the carrier, as for this purpose the carrier's man is to be considered as the plaintiff's servant. (*Boys v. Pink*, 1838, 8 C. & P. 361).

In an action for negligence, the declaration stated, that the plaintiff "had agreed to become a passenger" by the defendant's omnibus, and that the defendant "received the plaintiff as such passenger." Plea, that the plaintiff did not become a passenger, and that the defendant did not receive him as such. It appeared that the plaintiff held up his finger to the driver of the omnibus who stopped to take him up, and that just as the plaintiff was putting his foot on the step of the omnibus the driver drove on, and the plaintiff fell on his face on the ground:—Held, that this was evidence to go to the jury in support of the declaration, as the stopping of the omnibus implied a consent to take the plaintiff as a passenger. (*Brien v. Bennett*, 1839, 8 C. & P. 724).

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Proof that a carrier by his notice and practice does not charge for warehouse room during a certain period after the arrival of goods, supports an allegation that the defendant undertook that the goods should be kept "for certain reasonable compensation and reward."

(d) DAMAGES*.

IV. PRIVATE CARRIERS†.

Carrying away Tithes. See post, tit. *Tithes*.Carrying in the Roll. See post, tit. *Roll*.

Case, Action on the.

I. WHEN, BY AND AGAINST WHOM IT LIES, p. 500.

(a) WITH REFERENCE TO THE PARTICULAR CHARACTER OR CAPACITY OF THE PARTY. See tits.

Alien,
Attorney,
Auction and Auctioneer,
Bail,
Bankrupt,
Coroner,
Executor and Administrator,
Husband and Wife,
Hundred,
Infant,
Innkeeper,
Insolvent Debtor,

Judge,
Justice of the Peace,
Lunatic,
Master and Servant,
Partners and Partnership,
Pawnbrokers,
Pilot,
Principal and Agent,
Sheriff,
Surgeon,
Wharfinger,
West India Company.

(b) WITH REFERENCE TO REAL PROPERTY CORPoreal, p. 502. And see tits.

Dilapidations,
Fences,
Fixtures,
Nuisance,

Trespass,
Waste,
Watercourses.

* See sections 7 & 9 of 11 Geo. 4 & 1 Will. 4, c. 68, as to the amount of damages which a plaintiff is entitled to recover in cases within that statute. If a box of clothes, packed by the party's own hand, be sent by a carrier and lost, the Judge will recommend the jury to give the fair value of it in damages, although what particular articles the box contained cannot be proved. (*Butler v. Basing*, 1827; 2 C. & P. 613).

† If a person, who is not a common carrier, agree to carry goods for hire, he thereby agrees to make good losses arising from the negligence of his own servants, although he is not liable for any loss by thieves, or from any taking by force, or if the owner accompanies the goods to take care of them and was himself guilty of negligence. (*Brind v. Dale*, 1837, 8 C. & P. 207). If goods be delivered to A., under a contract that the owner should go with them, and take care of them, that is not a delivery of the goods to A. as a common carrier. (*Ib.*)

(c) WITH REFERENCE TO INJURIES TO REAL PROPERTY INCORPOREAL, p. 502. And see tits.

<i>Churches and Chapels.</i>	<i>Offices,</i>
<i>Distress,</i>	<i>Pew,</i>
<i>Easement,</i>	<i>River,</i>
<i>Fairs,</i>	<i>Tithes,</i>
<i>Fishery,</i>	<i>Tolls,</i>
<i>Franchise,</i>	<i>Watercourse,</i>
<i>Heriot,</i>	<i>Way.</i>
<i>Market,</i>	

(d) WITH REFERENCE TO INJURIES TO PERSONAL PROPERTY, p. 502. And see tits.

<i>Accident,</i>	<i>Justice of the Peace,</i>
<i>Animal; Injuries by and to,</i>	<i>Landlord and Tenant,</i>
<i>Bailment,</i>	<i>Mill,</i>
<i>Carriers,</i>	<i>Negligence,</i>
<i>Copyright,</i>	<i>Partners and Partnership,</i>
<i>Deceit,</i>	<i>Patent,</i>
<i>Decoy,</i>	<i>Replevin,</i>
<i>Distress,</i>	<i>Rescue,</i>
<i>Driving; Actions for negligently,</i>	<i>River,</i>
<i>False Return,</i>	<i>Sheriff,</i>
<i>Fences,</i>	<i>Ship and Shipping,</i>
<i>Fixtures,</i>	<i>Trespass,</i>
<i>Heriot,</i>	<i>Trover,</i>
<i>Hundred,</i>	<i>Warranty,</i>
<i>Innkeeper,</i>	<i>Watercourse.</i>

(e) WITH REFERENCE TO ITS APPLICABILITY AS A REMEDY FOR BREACHES OF CONTRACT, p. 502.

(f) WITH REFERENCE TO INJURIES TO PERSONS INDIVIDUALLY, p. 503. And see tits.

<i>Apothecary,</i>	<i>Malicious Arrest,</i>
<i>Bail,</i>	<i>Malicious Prosecution,</i>
<i>Carriers,</i>	<i>Nuisance,</i>
<i>Driving; Action for negligently,</i>	<i>Partner and Partnership,</i>
<i>Escape,</i>	<i>Perjury,</i>
<i>False Return,</i>	<i>Physician,</i>
<i>Highway,</i>	<i>Post-office,</i>
<i>Imprisonment,</i>	<i>School and Schoolmaster,</i>
<i>Innkeeper,</i>	<i>Sheriff,</i>
<i>Justice of the Peace,</i>	<i>Slander,</i>
<i>Libel,</i>	<i>Surgeon,</i>
	<i>Witness.</i>

(g) WITH REFERENCE TO INJURIES TO PERSONS RELATIVELY, p. 503. And see tits.

<i>Adultery,</i>	<i>Nuisance,</i>
<i>Driving,</i>	<i>Parent and Child,</i>
<i>Highway,</i>	<i>Imprisonment,</i>
<i>Husband and Wife,</i>	<i>Master and Servant,</i>

*School and Schoolmaster,
Seduction,*

*Surgeon,
Trespass.*

(h) WITH REFERENCE TO ITS APPLICABILITY AS A
REMEDY FOR THE RECOVERY OF PENALTIES
ON PENAL STATUTES, p. 503.

II. HOLDING TO BAIL IN, p. 503.

III. PLEADINGS.

(a) DECLARATION.

1. *Tit. Of the Court and Term.* See post, tit.
Declaration.
2. *As to the venue,* p. 503.
3. *Statement of the Cause of Action,* p. 503.

(b) PLEAS, ETC., p. 505.

IV. JUDGMENT AND COSTS, p. 505.



I. WHEN, BY AND AGAINST WHOM IT LIES*.

* An action on the case is, as the phrase itself significantly denotes, a remedy of very general application and utility. It conveys to the mind the satisfactory implication, that no injury can be sustained without a concomitant and adequate medium of redress. Its origin may be traced to the impracticability of even the most acute and sedulous jurist defining the nature of every civil wrong which one member of a community can experience from another. The earliest writs and processes were necessarily confined to the most obvious kinds of injuries; for whilst mankind was in a crude and infant state, the extent and diversity of human evil was scarcely perceptible, but the progress of society soon disclosed its magnitude. Cases of aggression arose, novel in their circumstances, and beyond the scope of any writs then known in practice, or within the limits affixed to the power of the person whose duty it was to prepare judicial process. The statute of Westminster, 2 Edw. 1, c. 24, therefore provides, "That as often as it shall happen in the Chancery, that in one case a writ is found, and in a *like case*, (in consimili casu), falling under the same right, and requiring like remedy, no writ is to be found, the clerks of the Chancery shall agree in making a writ or adjourn the complaint till the next Parliament, and write the cases in which they cannot agree, and refer them to the next Parliament, &c." Under the sanction of this statute, the clerks of Chancery constructed many writs for different injuries, which were considered as in consimili casu bearing a certain analogy to a trespass. The writs of trespass, though invented thus *pro re natâ*, in various forms, according to the nature of the different wrongs which respectively called them forth, began, nevertheless, to be viewed as constituting collectively a new individual *form of action*, and this new genus took its place by the name of trespass on the case among the more ancient actions of debt, covenant, trespass, &c. Such being the nature of this action, it comprises of course many different species, and affords new channels for redress. Hence, where neither law nor practice has expressly and in terms defined the kind of remedy to be instituted for an injury, actions are daily brought "on the case" itself; that is, on a legal and recognized form of statement of the injurious circumstances constituting or occasioning such claim to redress or compensation.

The following may be deemed an accurate and comprehensive definition of an action on the case:—It lies where a party sues for *damages* for any wrong or cause of complaint to which covenant or trespass will not apply. (Stephen on Plead. 15; 3 Woodd. 167).

Actions on the case are founded on the common law or particular statutory provisions, and lie generally to recover damages for consequential wrongs or torts to persons individually or relatively, or to personal property in possession or rever-

sion, or real property, corporeal or incorporeal, or some right or privilege incident or appertaining thereto. These suits arise, either from malfeasance, or doing an act which the defendant ought not to do, or misfeasance, being the improper performance of some act which might legally be done, or non-feasance, in the omission of some act he ought to do; and these several injuries are commonly the doing or omitting some act contrary to the general obligation of the law, or the particular rights or duties of the parties, or some express or implied contract between them.

Under the tit. *Actions*, (ante, Vol. 1, p. 73), have been already collected the decisions defining the nature of an action on the case, its general utility and limits, and the well known though often difficult-to-preserve boundary between actions of trespass, *vi et armis*, and actions on the case. The applicability of an action on the case is technically dependent on the peculiar nature and circumstances which characterize the injury; for if it be committed by direct force, either actual or implied, or occasioned by the immediate act of the defendant, trespass *vi et armis* is the proper remedy. (3 East, 600). An injury is considered as immediate when the act complained of *itself*, and not merely a consequence resulting from it, occasions the injury. Thus, if a log of wood be thrown into a highway, and in its descent to the ground strike a passenger, the injury proceeds direct and immediate from the original act; (3 East, 596); and where a lighted squib was thrown in a market-place, and afterwards thrown about by several in self defence, and ultimately hurt the plaintiff, the injury was adjudged to be the *immediate act* of the first thrower, and consequently a trespass; and that all the movements subsequent to the original throwing were merely a continuation of the first act and original force. (2 Bl. Rep. 392; 3 Wils. 403).

But, if the injury be not in legal contemplation forcible, or not direct and immediate on the commission of the act, but only consequential, then the appropriate form is an action on the case; (3 East, 593; 2 T. R. 231; Ld. Raym. 1399; 1 Stra. 634; 8 T. R. 19); which may be briefly illustrated by the preceding example respecting the log of wood; for, in that case, if the injury had not proceeded from the immediate act of throwing it down, but in consequence of its continuing in the highway, and a passenger had been hurt by falling over or against it, it being a consequence of the antecedent act of the defendant, the mode of redress would be by action on the case. (1 Stra. 636; 5 T. R. 649; 3 East, 602).

The design or intention of a wrong-doer is no criterion as to the form of action to be adopted; (2 Bl. 832; 3 East, 601); for where the act occasioning an injury is originally unlawful, although committed inadvertently, without the assent or concurrence of the mind; (2 East, 107; 6 East, 464; 8 T. R. 190); and the injury occasioned by it be immediate, trespass is the proper remedy, without reference to the intention of the defendant; and the legality or the illegality of the original act does not appear to afford any criterion, (3 Wils. 409; 2 Bl. 894; 5 East, 599), whether the injury was immediate or consequential; for a person may become an immediate trespasser, even in the performance of a lawful act; (1 Stra. 596; 3 Wils. 411); or, if he be guilty of neglect and unintentionally injure another while performing his duty, he will be equally responsible as if the original act had been unlawful; (11 Mod. 160; 2 Bl. Rep. 895); and, under these circumstances, recourse must be had to the primary rule, to ascertain whether the injury was direct and immediate, or mediate and consequential; in the former the proper remedy would be trespass, in the latter an action on the case. (2 Bl. Rep. 892).

In the case of injuries arising from improperly driving carriages, or navigating vessels, if the wrong done was direct, and be stated in the declaration to have been wilfully committed, or appear in evidence on the trial to have been so, the action must be trespass *vi et armis*; (3 East, 691; 8 T. R. 188); but if the injury were attributable to negligence, though it were immediate, the party injured has an election either to consider the negligence of the defendant as the cause of action and proceed in case, or he may treat the act itself as the injury and adopt an action of trespass. (3 East, 601; 2 N. R. 117).

But it is principally in actions for running down or damaging ships that difficulties as to the form occur, because the force which gives rise to the injury is not, in such case, necessarily the immediate act of the person striking; for the wind and waves may, and generally do, occasion the force, and the personal efforts of the party rather consist in putting the vessel in a position to be acted upon by the current or wind, than by any improvident management or neglect; consequently, in an action on the case, for running with great force and violence

- (b) WITH REFERENCE TO INJURIES TO REAL PROPERTY CORPOREAL*.
- (c) WITH REFERENCE TO INJURIES TO REAL PROPERTY INCORPOREAL†.
- (d) WITH REFERENCE TO INJURIES TO PERSONAL PROPERTY.‡
- (e) WITH REFERENCE TO THE APPLICABILITY OF AN ACTION ON THE CASE AS A REMEDY FOR BREACHES OF CONTRACT.§

against the ship of the plaintiff, it was determined, on a motion in arrest of judgment, after verdict for the plaintiff, on the hypothesis that the action should have been trespass instead of case, that the jury having found a verdict for the plaintiffs, the Court would consider the complaint as set forth in the declaration was substantiated in evidence; and for such a wrong an action on the case was a proper remedy. (8 T. R. 188; 1 B. & P. 472).

Having thus summarily reviewed the general doctrine, it will only be necessary in this place to state, that the decisions further illustrating the rules just expounded, will be found arranged according to the subject-matter affected by the injury or according to the means used to accomplish the aggression.

* Case is an appropriate remedy for any consequential injury to any party's real property corporeal: as, for placing a spout near the plaintiff's land, so that the water afterwards ran thereon; or for causing water to run from the defendant's lands to that of the plaintiff's; obstructing light or air through ancient windows; (see post, tit. *Nuisance*); or for injuries to watercourses; or for any other species of mediate damage to houses or lands, or to a decoy; (see post, tit. *Decoy*); or where the plaintiff's property is only in reversion. (See Com. Dig. *Action, Case, Nuisance*, (B); post, tit. *Nuisance, Trespass, Waste*). But where the injury to real property corporeal is immediate, or committed on land in the possession of the plaintiff, the remedy is trespass. (See this explained, *supra*, and ante, Vol. I., p. 73).

† As an action of trespass is only sustainable for direct aggressions to tangible things, as, the person, personal chattels, and real property corporeal, and not for the redress of injuries to the health of individuals, their personal character, or real property incorporeal; it follows that case is the only proper mode of redress for wrongs done by disturbance of common or encroachments on the right to offices, franchises, ferries, markets, tolls, or ancient mills, or obstructing the plaintiff in the enjoyment of pews, or private ways, or other incorporeal right.

‡ For all injuries to personal property, not committed with force, or immediate, or where the plaintiff's right to the chattel is in reversion, case is the proper remedy.

§ This action is a concurrent remedy in some cases with assumpsit for breaches of contract, whether the breach were non-feasance, misfeasance, or malfeasance. In *Dickson v. Clifton*, (2 Wils. 319), it was holden, that where the breach of an express contract amounts to a tort, the party injured may at his election bring either assumpsit or trespass; and that, therefore, case lies upon an express agreement for obstructing the plaintiff in the enjoyment of an easement, of which the defendant stipulated that the plaintiff should have the benefit. Case is also a proper remedy against bailees for neglect in the care of goods (ante, tit. *Bailment*); and from *Judin v. Samuel*, (1 N. R. 43), it would seem that case lies for not accounting for the produce of bills delivered to the defendant to get discounted. There the first count of the declaration was in trover for bills of exchange; and the second and third counts stated the delivery of the bills to the defendant in order that he might get them discounted for a certain amount, and his having got them discounted, and his converting and disposing of the money to his own use. The defendant demurred generally, on the ground of a misjoinder of tort and contract, the subject of the last counts being matter of contract; but the Court held, on general demurrer, that as all the counts were in the form of tort, if any count were good, judgment must be given for the plaintiff.

It is in many cases important, where these concurrent remedies present themselves for the redress of the same injury, that a judicious selection should be made. In exercising this discretion, it is always material to consider the effect

- (f) WITH REFERENCE TO INJURIES TO PERSONS INDIVIDUALLY*.
- (g) WITH REFERENCE TO INJURIES TO PERSONS RELATIVELY†.
- (h) WITH REFERENCE TO ITS APPLICABILITY AS A REMEDY FOR THE RECOVERY OF PENALTIES UNDER PENAL STATUTES‡.

II. HOLDING TO BAIL IN. See ante, tits. *Affidavit—To Hold to Bail—Arrest.*

III. PLEADINGS.

(a) DECLARATION.

2. *As to the Venue* §.

3. *Statement of the cause of Action* ||.

CORBETT *v.* PACKINGTON, H. T. 1827. K. B. 6 B. & C. 269; S. C. 9 D. & R. 258.

THE declaration stated, in the first count, that the plaintiff, at A count that the defendant,

it would produce on the ulterior proceedings in the cause; as, by a prudent choice of a remedy, the defendant may be frequently precluded from availing himself of a defence which he might otherwise establish. Thus, bringing an action in tort, a set-off may be avoided; as where goods have been sold by a person in contemplation of bankruptcy, by way of fraudulent preference to a creditor, the remedy for the assignees should be trover, and not assumpsit; because, in the latter form of action, the defendant might avail himself of the debt due from the bankrupt as a counter claim. (See 2 H. Bl. 135; 4 T. R. 211; 6 T. R. 695; 3 East, 70; 10 Id. 392; 12 Id. 605). So, in some instances, by proceeding in case instead of assumpsit, a defendant may be precluded from availing himself of his certificate.

* This action is maintainable for all kinds of injuries done to the absolute rights of persons, not immediate, but consequential; as for a malicious arrest under regular process, or malicious prosecution; or for keeping mischievous animals, having a knowledge of their dangerous propensity; or for personal damage arising from a public nuisance; or for injuries to the health or reputation of individuals; or for acts of sheriffs, justices, or other officers, acting ministerially, and not judicially; or against surgeons, or other professional persons, for want of necessary skill. But where the act complained of has been done under judicial, but irregular process, the remedy must be trespass *vi et armis*. (See 2 T. R. 225).

The remedy for maliciously suing out a commission of bankruptcy has been already pointed out, ante, tit. *Bankrupt*.

† The applicability of an action on the case, as a mode of redressing injuries to relative rights, is governed by the general question of whether it is really brought for the force, or for the consequential loss ensuing from the previous violence. (See the appropriate titles of *Adultery, Husband and Wife, Master and Servant, Parent and Child, &c.*).

‡ Whenever a statute prohibits an injury to an individual, or enacts that he shall recover a penalty or damages for such injury, though the statute be silent as to the form of the remedy, this action may be supported; (Com. Dig. tit. *Action upon statute*, A., F.); and it has been decided that, where a navigation act empowered the company to sue for calls, &c., by action of debt or on the case, that an action in tort might be supported; and if a statute give a remedy in the affirmative without a negative, and expressed or implied to be for a matter which was actionable by the common law, the party may sue at common law, as well as upon the statute (Com. Dig. *Action upon stat.*, C). See post, tits. *Conviction, Declarations, Hundred, Riot Act*.

§ This is a transitory action, and the venue may be laid in any county.

|| The declaration ought not to state the injury to have been committed *vi et armis*; nor should it conclude *contra pacem*; but as the decisions connected with

for certain reward "agreed to take due and proper care, re-deliver, &c.," is in assumpsit and not case.

delivered divers, to wit, four boars, thirteen sows, and thirteen pigs, of great value, to wit, of the value of 50*l.*, to be by the defendant safely and securely kept, and fed, and tacked in a certain park and upon certain premises of the defendant, for reward to the said defendant in that behalf; yet the said defendant, not regarding his duty in that behalf, afterwards, and whilst he had the said boars, sows, and pigs, for the purpose aforesaid, to wit, on the 10th December aforesaid, by himself and his servants in that behalf, conducted himself so carelessly, negligently, and improperly, in and about the keeping the said boars, sows, and pigs, as aforesaid, that, by and through the mere negligence and improper conduct of the defendant and his servants in that behalf, the said boars, sows, and pigs became, and were, and are wholly lost to the said plaintiff." This count was admitted to be in case; and nothing turned upon it. The second count stated "that, on the 16th November, in the year aforesaid, the plaintiff, at the special instance and request of the defendant, had caused to be delivered to him, the said defendant, divers, to wit, four other boars, thirteen other sows, and thirteen other pigs of the said plaintiff, of great value, to wit, of the value of 50*l.*, to be taken care of by the said defendant for the said plaintiff for reward to him the said defendant in that behalf; and, in consideration thereof, he the defendant undertook, and then and there agreed with the said plaintiff to take due and proper care of the said last-mentioned boars, sows, and pigs, and to re-deliver the same to the said plaintiff when he the said defendant should be thereunto requested; and although the said defendant was afterwards, to wit, on the 10th December, in the year aforesaid, requested by the plaintiff to re-deliver the said last-mentioned boars, sows, and pigs to the said plaintiff, yet he the said defendant, not regarding his duty in that behalf, but contriving and fraudulently intending, &c., did not, nor would when he was so requested as aforesaid, or at any time, &c.; the count went on to aver that the defendant did not re-deliver on request. This count the defendant contended was in assumpsit. There was also a count in trover.

The Court were of opinion, that the counts in question were improperly joined; and, therefore, that judgment must be arrested. It was clear that tort and assumpsit could not be joined together; and although the case of *Lea v. Welch*, (2 *Ld. Raym.* 1517), decided that a promise must be expressly stated, they were of opinion that *Mountford v. Horton*, (2 *N. R.* 62), was the better authority; and that the stating an agreement was sufficient to import a promise; and this raised the objection against such a count being joined with a count in tort. It might seem to be a nice distinction between "undertaking" and "agreeing," which constituted the difference; but they were of opinion, that it was the agreement to re-deliver which made the assumpsit; and that the undertaking to take due and proper care of the thing, that undertaking standing by itself, would make the defendant only a bailee. There was no common-law obligation to re-deliver raised by the mere delivering to the bailiff to take due care. In *Coggs v. Bernard*, (2 *Ld. Raym.* 909), the

this division are necessarily applicable rather to the description of particular injuries or referable to the general rules to be observed in the framing of declarations, it has been thought better to place them under the particular titles, than to introduce them here.

count was properly framed in tort, for there was no consideration stated; but here there was a consideration stated, that consideration being, in part, that the defendant was to have reward; thus clearly shewing a contract and an implied promise by the defendant to perform it. Nor was the case at all like that of *Mast v. Goodson*, (3 Wils. 348), for there the count joined to the count in trover charged only a duty without any agreement or any consideration. The terms of the agreement, as here charged, might have been in writing; but the breach of that agreement could not be charged as a tort. For these reasons, and because the second count had all the ingredients necessary to raise assumpsit, they were of opinion that it could not be joined with the count in trover, though they much wished, if it were in their power, to discourage so ungracious an objection.

(b) PLEAS*.

IV. JUDGMENT AND COSTS †.

PRICE v. HARRIS, E. T. 1834. C. P. 10 *Bing.* 557; S. C. 4 *M. & Scott*, 474.

THE plaintiff brought an action on the case against eighteen defendants, for an injury done to his reversion in certain premises. One of the defendants suffered judgment by default, the others pleaded, and a verdict was found for them.

Per Cur.—The words of the 4 Jac. 1, c. 3, are, “That if any person after the end of the present session of Parliament shall commence or sue in any court of record, or in any other court an action &c., or any other action whatsoever, wherein the plaintiff might have costs if in case judgment should be given for him, and the plaintiff, &c., in any such action, &c., after appearance of defendant, be nonsuited, or that any verdict happen to pass by any lawful trial against the plaintiff, that then the defendant in every such action shall have judgment to recover his costs against every such plaintiff, &c.” These being the words of the statute, it is material to see whether they apply to a case like the present, where there has been a judgment by default; the words are evidently applicable to the two cases where the plaintiff is nonsuited, or that a verdict happens to pass by any lawful trial against him. Now, it is clear, that where a plaintiff may be nonsuited, or where there may be a verdict for the defendants, there the defendants must have pleaded, as they have in this case, the plea of not guilty. The words of the act are, “or that verdict happen to pass by any lawful trial;” and there can be no lawful trial except by those who have pleaded to lawful issue. A

In case, though one defendant suffers judgment by default, the others who obtain a verdict are entitled to their costs.

* By Rule H. T. 4 Will. 4, in actions on the case, the plea of not guilty will operate as a denial of the breach of duty, or wrongful act alleged to have been committed by the defendant, and not of the facts stated in the inducement; and no other defence than such denial shall be admissible under that plea. All other pleas in denial shall take issue on some particular matter of fact alleged in the declaration.

† The ordinary judgment in an action on the case is, that the plaintiff do recover the sum found by the jury in damages.

judgment by default is distinguishable from the case of those who plead after the plea of not guilty, and the issue is found for them. In the first place, the *venire facias* or process to bring in the jury, contains an entry of an *unica taxatio*, viz. that it is convenient that there be but one taxation of damages &c.; the *venire* is awarded as well to try the issues as to assess damages against those who suffer judgment by default. Now, it is not essentially necessary that the jury should upon the trial assess the quantum of damages against those who have suffered judgment by default; for if such assessment was omitted, it may be supplied by a writ of inquiry before the sheriff and his jury. But, though not essentially necessary, it is certainly convenient that the assessment of damages should be thus made. The principle laid down and acted upon in *Day v. Hanks*, (3 Term. Rep. 654), should in our opinion govern this case. This case appears to us to be within the words of the statute of Jac. 1: the defendants only went to trial upon their plea of not guilty; a verdict was found for them, and they are consequently in our opinion entitled to their costs; neither can this be said to be unreasonable, as the plaintiff had the option of having damages assessed against the party who suffered judgment by default, instead of which he thought proper to carry all to trial.

BY 4 & 5 VICT., c. 28.

The 4 & 5 Vict. repeals the 43 Eliz. and the 22 Car. 2, and provides, that the plaintiff in actions on the case shall not be entitled to costs unless he receives 40s. damages.

“WHEREAS by an act passed in the last session of Parliament, intituled ‘An Act to repeal part of the 43rd year of the reign of Queen Elizabeth, intituled ‘An Act to avoid trifling and frivolous suits in law in Her Majesty’s Courts in Westminster;’ and of an act of the 22nd and 23rd years of the reign of King Charles II, intituled ‘An Act for laying impositions on proceedings at law;’ and to make further provisions in lieu thereof, the said act of the 43rd of Elizabeth, so far as it relates to costs in actions of trespass or trespass on the case, and so much of the said act of the 22nd and 23rd of Charles II. as relates to costs in personal actions, was repealed: And whereas it is expedient to remove all doubt whether plaintiff in actions which had been commenced, and wherein verdicts had been returned, before the passing of the said act of the last session, for less damages than 40s., may not still be entitled to their full costs of suit, contrary to the manifest intention of the same;’ it is enacted, ‘That the said act of the last session* shall be and is hereby repealed, so far as the same repeals or may be deemed to repeal the said statute of the 43rd of Elizabeth, or the said statute of the 22nd and 23rd of Charles II., in respect to actions wherein verdicts had been returned before the passing of the said act of the last session.

And by s. 2 it is enacted, That no plaintiff, who had before the passing of the said act of last session obtained a verdict for a less amount of damages than forty shillings, shall now be entitled to full costs, unless he was so entitled immediately before the passing of the said act of last session: provided, nevertheless, that if any such plaintiff shall have proceeded since the passing of the said last-mentioned act, and before the third day of May, one thousand eight hundred and forty-one, to tax his full costs on any such verdict so obtained for less than forty shillings, nothing in this act contained shall de-

* 3 & 4 Vict. c. 24.

prive such plaintiff of any remedy thereon, which he may now have for the recovery thereof; but it shall be lawful for such Court or Judge, on the application of any defendant in such action, to stay all the proceedings on such application, upon payment of such costs as such Court or Judge shall think fit.

Case Reserved. See tit. *Special Case*.

Casual Ejector. See tit. *Ejectionment*.

Cattle*.

5 *Peters. Abr.* 200. See tits. *Animals—Deer-stealing—Fish—Horse-stealing—Impounding—Indictment—Sheep-stealing*.

REX v. STROUD, 1835. N. P. 6 C. & P. 535.

THIS was an indictment for stealing "one sheep," under 7 & 8 Geo. 4, c. 29. On an objection that the evidence did not prove the indictment—

The judge held that the indictment was sustainable, whether the animal proved was a rig or a wether.

Under 7 & 8 Geo. 4, the word "sheep" includes a rig or a wether;

REX v. GILLBRASS, 1836. C. C. C. 7 C. & P. 445.

UNDER the 7 & 8 Geo. 4, the prisoner was indicted for stealing a cow and a heifer. On referring to the statute authorizing the payment of a reward in certain cases, (7 Geo. 4, c. 64, s. 28,) it appeared that the only words at all applicable to the present case were "bullock-stealing."

The Recorder.—Upon consideration, and a reference to the 25th section of the 7 & 8 Geo. 4, c. 29, which relates to the offence of cattle-stealing, thought that the words "bullock-stealing" "horse-stealing," and "sheep-stealing," used in the 7 Geo. 4, were intended to describe the kind or class of offences in connexion with which rewards were to be allowed, and made an order for the allowance of compensation accordingly.

and "bullock-stealing," includes a cow or heifer.

REX v. HAUGHTON, 1833, N. P. 5 C. & P. 559.

THE prisoner was indicted for killing a cow under the 7 & 8 Geo. 4. It appeared that the cow-house in which the cow was

Setting fire to a cow-house, and

* By 7 & 8 Geo. 4, c. 29, s. 5, "If any person shall steal any horse, mare, gelding, colt, or filly; or any bull, cow, ox, heifer, or calf; or any ram, ewe, sheep, or lamb; or shall wilfully kill any of such cattle, with intent to steal the carcase or skin, or any part of the cattle so killed, such person, by 1 Vict. c. 90, s. 1, shall be transported for not more than fifteen years, nor less than ten years; or imprisonment for not more than three years."

An indictment upon the 7 & 8 Geo. 4 charged, in the first count, that A. and B. killed a sheep, with intent to steal one of its hind legs; and in the second count, that C. received nine pounds weight of mutton so stolen as aforesaid; and in the third count, that C. received the mutton "of a certain evil-disposed person," scianter, &c. Held, that on this form of indictment all the three prisoners might be properly convicted. (*Rex v. Wheeler*, 1835, N. P., 7 C. & P. 170).

thereby burning a cow, is a killing within the 7 & 8 Geo. 4*;

placed had been set fire to and burnt, and that the cow had been burnt to death in it.

Mr. Justice *Tauntton*.—If the prisoner set this place on fire while the cow was in it, and the cow was thereby burnt to death, that is a killing of the cow by him within the meaning of the act of Parliament.

—
REX v. HUGHES, 1826. N. P. 2 C. & P. 420.

but setting a dog at a sheep was not a maiming within the 4 Geo. 4.

UNDER the 4 Geo. 4, c. 54, the prisoner was indicted for wounding a sheep. It appeared that the prisoner set a dog at a sheep, and that the dog, by biting it, inflicted severe wounds.

Park, J., said, This is not an offence at common law, and is only made so by a statute; and I am of opinion that injuring a sheep by a setting a dog to worry it is not a maiming or wounding within the meaning of the statute.

* Which enacts, that if any person shall unlawfully and maliciously kill, maim, or wound any cattle, felony. By 1 Vict. c. 90, s. 2, transportation for not more than fifteen, nor less than seven years; or imprisonment, with or without hard labour, for not more than three years. Asses are cattle within the meaning of this act; (*Rex v. Whitney*, Ry. & M. 3); so are pigs; (*Rex v. Sarah Chapple*, R. & Ry. 77); so are sheep, oxen, cows, horses, &c. To constitute a wounding within the meaning of this act, it is not necessary that it should create a permanent injury. (*Rex v. Haywood*, R. & Ry. 16).

With respect to ill-treating cattle, it is enacted by 5 & 6 Will. 4, c. 59, s. 2, if any person shall "wantonly and cruelly beat, ill-treat, abuse, or torture any horse, mare, gelding, bull, ox, cow, heifer, steer, calf, mule, ass, sheep, lamb, dog, or any other cattle or domestic animal; or if any person who shall drive any cattle or other animal shall, by negligence or ill usage in the driving thereof, be the means whereby any mischief, damage, or injury shall be done by any such cattle or other animal," upon conviction before one justice, he shall forfeit and pay (over and above the amount of the damage or injury, if any done thereby, which damage or injury shall be ascertained and determined by such justice) such a sum of money not exceeding 40s. nor less than 5s., with costs, as to such justice shall seem meet, or, in default of payment, he shall be imprisoned for not more than fourteen days."

By sect. 3, it is enacted, "That, if any person shall keep or use any house, room, pit, ground, or other place, for the purpose of running, baiting, or fighting any bull, bear, badger, dog, or other animal, (whether of domestic or wild nature or kind), or for cock-fighting, or in which any bull, bear, badger, dog, or other such animal shall be baited, run, or fought," penalty not more than 5*l.* nor less than 10*s.* for every day in which he shall so keep and use such house, room, pit, ground, or place, for any of the purposes aforesaid.

And by the same section, the person who shall act as the manager of any such place, &c., or who shall receive any money for the admission of any person thereto, or who shall assist in any such baiting, or fighting, or bull-running, shall be deemed or taken to be the keeper of the same and liable to all the penalties, &c.

By sect. 10, the offender may be apprehended, without a warrant, by any constable, or by the owner of the animal, either upon view of the offence, or upon the information of any other person who shall declare his name and place of abode to the constable; and he shall then be taken before a justice of the peace, who shall examine the witnesses, &c. (Id. s. 9). If, when before the justice, the prisoner shall refuse to tell his name and place of abode, he shall be delivered over to a constable and by him be taken to the common gaol or house of correction, there to remain for not more than one calendar month, or until he make known his name and place of abode to the said justice.

Prosecutions under this act must be commenced within three calendar months after the commission of the offence. (Id. s. 11). But in another section it is provided, that, in all cases where no other mode of proceeding is specially provided, or in any case where the party shall not be conveyed before a justice by the authority of this act, it shall be lawful for any one justice, upon information or complaint made by any person of an offence against this act, "within fourteen

Caveat*.

Central Criminal Court†.

days next after the commission of any such offence," to summon the party before him or some other justice; and, upon his appearance or default, to examine into the matter, &c.; (Id. s. 13); which summons, or a copy, may be served personally or left for the party at his usual or last known place of abode. (Id. s. 15).

The evidence of the party complaining shall be received in proof of the offence; (Id. s. 11, 18); so, the evidence of any overseer or inhabitant of the parish, though the penalty go to the poor of that parish. (Id. s. 11).

By sect. 12, where the penalty or sum awarded for damage shall not be paid either immediately or within the time appointed by the justice, the justice may commit the offender to the common gaol or house of correction, there to be imprisoned, with or without hard labour, for not more than fourteen days, if the sum and costs do not exceed 5*l.*, or for not more than two calendar months where the sum and costs exceed that amount; the commitment to determine on payment of such sum and costs.

By sect. 17, one moiety of the penalty is to go to the overseer of the poor of the parish where the offence was committed, to be applied in aid of the parish rates, the other moiety and costs to the informer or prosecutor, or to such person as the justice shall deem fit. And any sum awarded for damage to be paid to the party injured.

By sect. 20, parties aggrieved may appeal to the next sessions, giving to the justice fourteen days' notice of appeal, with the cause and matter thereof.

* A caveat is a process in the spiritual court prohibiting the institution of a clerk to a benefice, a probate of a will, administrations, licenses, dispensations, faculties, institutions, &c., from being granted. And when a caveat is entered against an institution, administration, or the like, if the bishop institutes a clerk, or administration be granted, it is void; but, by the common law, an admission, institution, probate, or the like, granted contrary to a caveat, shall stand good, because the temporal courts merely view a caveat as a caution, like a caveat entered in Chancery against the passing of a patent, or in the Common Pleas against the levying of a fine. (See 2 Bac. Abr. 404; Gibs. 778; Ayl. Par. 145, 146; 1 Vernon, 119; 1 Lev. 157; Owen, 50).

† By the 4 & 5 Will. 4, c. 36, several very important provisions were introduced with respect to the jurisdiction of the Court, previously called the Old Bailey, by sect. 1, henceforth to be called the "Central Criminal Court." The Court was opened on the 1st November, 1834.

The commissions were read by the town-clerk of London; and then the lord mayor, as chief commissioner, with the assent of the other commissioners, appointed Mr. *John Clark*, the clerk of the peace for the city of London, to fill the office of clerk of the Central Criminal Court. The different days which had been appointed by their Lordships for holding the several sessions, were then stated by Mr. Clark, and the commission was adjourned.

PRACTICE.

Where bills for misdemeanors are found under the commission of oyer and terminer at the Central Criminal Court, the defendant must give forty-eight hours' notice of bail, unless the application for process is made on a Friday, in any case in which there is reason to think that there is a desire to keep the party in custody over Sunday. (*Rex v. Cartile*, 6 C. & P. 628).

In the January session, 1842, the following rule of practice was promulgated by the Court:—"It is ordered by the Court that henceforward, whenever a prosecutor shall have preferred a bill of indictment against a defendant, and shall move the Court for process to issue upon the said indictment against the said defendant, the prosecutor so applying shall, before such process shall issue, him-

self enter into such recognizances as the Court shall direct, to prosecute the law with effect against the said defendant."

"An Act for establishing a new Court for the Trial of Offences committed in the Metropolis and Parts adjoining:—

"Whereas it is expedient, for the more effective and uniform administration of justice in criminal cases, that offences committed in the Metropolis and certain parts adjoining thereto should be tried by Justices and Judges of Oyer and Terminer and Gaol Delivery in the city of London: Be it therefore enacted, that the lord mayor for the time being of the city of London, the Lord Chancellor or Lord Keeper of the Great Seal, and all the Judges for the time being of His Majesty's Courts of King's Bench, Common Pleas, and Exchequer, the Chief Judge and the two other Judges in Bankruptcy, the Judge of the Admiralty, the Dean of the Arches, the Aldermen of the city of London, the Recorder, the Common Serjeant, the Judges of the Sheriffs' Court of the city of London for the time being, and any person or persons who hath or shall have been Lord Chancellor, Lord Keeper, or a judge of any of His Majesty's superior Courts of Westminster, together with such others as His Majesty, his heirs and successors, shall from time to time name and appoint by any general Commission as hereinafter stated, shall be and be taken to be the judges of a court to be called the "Central Criminal Court," to which His Majesty, and his heirs and successors, may direct his general Commission as herein-after mentioned; and which Court shall have jurisdiction to hear, try, and determine all offences committed or alleged to be committed as herein-after specified."

Sect. 2. "That it shall be lawful for His Majesty, his heirs and successors, from time to time to command and cause to be issued Commissions of Oyer and Terminer to inquire of, hear, and determine all treasons, murders, felonies, and misdemeanors committed within the city of London and County of Middlesex, and those parts of the counties of Essex, Kent, and Surrey, within the parishes of Barking, East Ham, West Ham, Little Ilford, Low Laiton, Walthamstow, Wanstead St. Mary, Woodford and Chingford, in the county of Essex; Charlton, Lee, Lewisham, Greenwich, Woolwich, Eltham, Plumstead, St. Nicholas Deptford, that part of St. Paul Deptford which is within the said county of Kent, the Liberty of Kidbrook, and the Hamlet of Mottingham, in the county of Kent; and the Borough of Southwark, the parishes of Battersea, Bermondsey, Camberwell, Christchurch, Clapham, Lambeth, St. Mary Newington, Rotherhithe, Streatham, Barnes, Putney, that part of St. Paul Deptford which is within the said county of Surrey, Tooting Graveney, Wandsworth, Merton, Mortlake, Kew, Richmond, Wimbledon, the Clink Liberty, and the district of Lambeth Palace, in the county of Surrey; and also Commissions of Gaol Delivery to deliver his Majesty's gaol of Newgate of the prisoners therein charged with any of the offences aforesaid, committed within the limits aforesaid; and it shall be lawful for the Justices and Judges of the Central Criminal Court aforesaid, or any two or more of them, to inquire of, hear, determine, and adjudge all such treasons, murders, felonies, and misdemeanors, and all treasons, murders, felonies, and misdemeanors which might be inquired of, heard, and determined under any Commission of Oyer and Terminer for the city of London or county of Middlesex, or Commission of Gaol Delivery to deliver the gaol of Newgate, or which, in case the parts of the counties of Essex, Kent, and Surrey respectively comprised within the limits aforesaid had been counties of themselves, might have been inquired of, heard, and determined under Commissions of Oyer and Terminer and Gaol Delivery for such counties, and to deliver the said gaol of Newgate at such times and places in the said city or the suburbs thereof as by the said Commissions shall be appointed, or as the said justices and judges by virtue and in pursuance thereof, or any two or more of them shall appoint, and to award and issue all precepts and process, and use and exercise all powers and authorities belonging to Justices of Oyer and Terminer and Gaol Delivery: Provided always, that such Court shall have power and jurisdiction to proceed on every such commission so issued as aforesaid and act under such commission until a new commission shall be issued."

Sect. 3. "That the District situated within the limits of the jurisdiction herein-before established shall be deemed and taken to be, in all cases tried before the said justices and judges, one county for all purposes of venue, local description, trial, judgment, and execution, not herein specially provided for; and that in all indictments and presentments preferred and tried before the said justices and judges the venue laid in the margin shall be as follows:—"Central Criminal

Court to wit;" and all offences which in other indictments would be laid to have been committed in the county where the trial is had, and all material facts which would be in other indictments averred to have taken place in the county where the trial is had, shall, in indictments prepared and tried in the said court, be laid to have been committed and averred to have taken place "within the jurisdiction of the said Court."

Sect. 4. "That the sheriffs of the city of London, and of the counties of Middlesex, Essex, Kent, and Surrey, respectively, shall execute and obey all precepts and process which the said justices and judges shall award, issue, and direct unto them respectively, and shall, whenever required and commanded, summon and return from the said city of London and county of Middlesex, and from the parts of the said counties of Essex, Kent, and Surrey within the limits of this act, a competent number of persons qualified according to law to inquire of, present, and try all offences and other matters cognizable by the said justices and judges; and the persons so returned, whether taken wholly from the city of London or the said counties, or taken indiscriminately from the said city and the said counties, shall have authority to inquire of, present, hear, try, and determine all such offences and other matters, and all issues and all matters of fact arising out of such trials or relating thereto, notwithstanding that such persons are not inhabitants of the city, county, or place where such offences or other matters may be committed or arise; and any person having served upon any grand jury or petty jury summoned and returned from the said counties of Essex, Kent, and Surrey, under the authority of this act, shall henceforth be exempt for and during twelve calendar months next after such service from serving upon any jury in any court (except the sessions of the peace) to be holden for the county in which such juror shall reside."

Sect. 5. "That it shall be lawful for his Majesty, by and with the advice of his Privy Council, from time to time to order and direct in what gaol, house of correction, or other prison, being within the limits of this act, any person or persons charged with or convicted of offences committed or alleged to have been committed within the limits of this act shall be imprisoned or kept in custody; and that when and so often as his Majesty, by and with the advice of his Privy Council, shall be pleased to give such orders and directions, the said justices and judges of Oyer and Terminer and Gaol Delivery, and all justices of the peace, coroners, and other magistrates acting within the limits of this act, shall commit all persons charged or convicted before them to such gaol, house of correction, or other prison, as in such orders or directions shall be expressed and commanded, any law, usage, or custom to the contrary notwithstanding; provided nevertheless, and it is hereby declared, that the city, county, or place in which the offence of such person or persons was committed or alleged to have been committed shall be liable to and charged with the expense of supporting and maintaining such prisoner during his imprisonment in such gaol, house of correction, or other prison, at and after such rate as his Majesty, by and with the advice of his Privy Council, shall order and direct, and shall be paid by the treasurer of the said city, county, or place in which such offence was committed or alleged to have been committed: provided nevertheless, that the county of Middlesex and city of Westminster and liberty of the Tower of London shall not be liable to any charge for the support and maintenance of any prisoner charged with any offence in the said county, city, or liberty, who shall be committed to his Majesty's gaol of Newgate."

Sect. 6. The Penitentiary at Milbank to be one of the prisons under the act.

Sect. 7. Persons under sentence of imprisonment for offences committed beyond the limits of the act may be removed to the Penitentiary at Milbank.

Sect. 8. The regulations of the Penitentiary acts to apply to prisoners confined by the authority of this act.

Sect. 9. Convicted persons may be imprisoned in the county gaol or Newgate, and in such latter cases the sheriffs of London may execute the judgment pronounced.

Sect. 10. Justices and coroners in Essex and Kent to commit offenders to Newgate, and justices and coroners in Surrey to commit offenders to Horse-monger Lane, and certify examinations to the Court.

Sect. 11. Justices and coroners to specify that persons are committed under this act, and to take examinations, &c. as required under 7 G. 4, c. 64; and power is given to remove prisoners from the county gaol of Surrey to Newgate.

Sect. 12. "Power to order payment of expenses to prosecutors and wit-

nesses, and the treasurer of the county, or his agent, is to attend the Court to pay orders."

Sect. 13. "That no bill of indictment for any misdemeanor (other than perjury or subornation of perjury), which can or may be presented to the grand jury at any sessions of the peace for the said city of Westminster and borough of Southwark, and counties of Middlesex, Essex, Kent, and Surrey respectively, in which such misdemeanor was committed or alleged to have been committed, shall be presented to the grand jury to be summoned under the authority of this act, unless the prosecutor or other person presenting such indictment shall have been bound by recognizance to prosecute or give evidence at the sessions to be held under the authority of this act against the person or persons accused of such misdemeanor, or unless such person or persons accused shall have been committed to or detained in custody, or shall be bound by recognizance to appear at the said sessions to be held under the authority of this act."

Sect. 14. "The Court of the lord mayor and aldermen of London may contract with the justices of Essex, Kent, and Surrey, for the support of their prisoners in Newgate, and if they cannot agree the Judges are to settle the amount."

Sect. 15. "That the said Justices and Judges of Oyer and Terminer and gaol delivery to be appointed under the authority of this act, or any two or more of them, shall hold a session for the said city of London and county of Middlesex, and the parts of the counties of Essex, Kent, and Surrey hereinbefore mentioned, in the said city of London or suburbs thereof, at least twelve times in each and every year (and oftener if need be), such times to be fixed by general orders of the said Court, which any eight or more of the said Judges of His Majesty's Courts of Westminster are hereby empowered to make from time to time."

Sect. 16. "That it shall be lawful for His Majesty's Court of King's Bench, or any Judge thereof, or any commissioner of Oyer and Terminer and gaol delivery under this act, being a Judge of any of the superior courts at Westminster, or the Chief Judge or any other Judge of the Court of Bankruptcy, or the Recorder for the said city of London for the time being, if such Court, Judge, or Recorder shall think proper, to issue any writ or writs of certiorari, or other process, directed to His Majesty's justices of the peace acting in and for the cities of London and Westminster, the liberty of the Tower of London, the Borough of Southwark, and the counties of Middlesex, Essex, Kent, and Surrey, or either of them, commanding the said justices of the peace, or any or either of them, to certify and return into the said Court of Oyer and Terminer and gaol delivery indictments or presentments found or taken before the said justices of the peace, or any of them, of any offences cognizable by virtue of this act, and the several recognizances, examinations, and depositions relative to such indictments and presentments, so that the same offences may be dealt with, tried, and determined by the said justices and judges of Oyer and Terminer and gaol delivery; and also for the like purpose, by writ or writs of habeas corpus, to cause any person or persons who may be in the custody of any gaol or prison charged with any offences cognizable under this act to be removed into the custody of the keeper of the gaol of Newgate."

Sect. 17. "That the justices of the peace acting in and for the said cities of London and Westminster, the liberty of the Tower of London, the Borough of Southwark, and the counties of Middlesex, Essex, Kent, and Surrey, shall not, at their respective general or quarter sessions of the peace, or any adjournment thereof, try any person or persons charged with any capital offence, or with any of the following offences committed or alleged to be committed within the limits of this act; that is to say, housebreaking, stealing above the value of 5*l.* in a dwelling-house, horse-stealing, sheep-stealing, cattle-stealing, maliciously wounding cattle, bigamy, forgery, perjury, conspiracy, assault with intent to commit any felony, administering or attempting to administer poison with intent to kill or to do some grievous bodily harm, administering drugs or other things or doing any thing with intent to cause or procure abortion, manslaughter, destroying or damaging ships or vessels, the breaking of shops, warehouses, counting-houses, and buildings within the curtilage of dwelling-houses, killing sheep with intent to steal the carcases, the uttering of all forged instruments, and the various offences enumerated in the act passed in the first year of the reign of his present Majesty, intituled 'An Act for reducing into one act all such forgeries as shall henceforth be punished with death; and for otherwise amending the laws relative to forgery, forging the assay marks on gold or silver plate, and all the offences

relating to coin enumerated in the act passed in the second year of the reign of his present Majesty, intituled 'An Act for consolidating and amending the laws against offences relating to the coin,' the abduction of women, bankrupts not surrendering under their commission or concealing their effects, breaking down bridges and banks of rivers, taking rewards for helping to stolen goods, personating any officer, seaman, or other persons in order to receive any wages, pay, allowance, or prize money due or supposed to be due, or any out-pensioner of Greenwich Hospital in order to receive any out-pension allowance due or supposed to be due, sending threatening letters and using threats to extort money, larceny on navigable rivers and canals, and stealing and destroying goods in progress of manufacture, and larcenies after a previous conviction, embezzlement, larceny by clerks and servants, and receivers of stolen goods, whether such person or persons shall be charged as principal offenders or as accessories before or after the fact."

Sect. 18. "That every recognizance which shall have been or shall be entered into for the prosecution before his Majesty's justices of the peace aforesaid of any person for any offence cognizable under this act, and any recognizance for the appearance as well of any witness to give evidence upon any bill of indictment or presentment for any such offence as of any person to answer our lord the king for or concerning any such offence, or to answer generally before such justice of the peace, shall, in case any such writ of certiorari or habeas corpus be issued for the purpose of removing such indictment or presentment or such person so in custody as aforesaid, be obligatory on the parties bound by such recognizance to prosecute and appear and give evidence and do all other things therein mentioned with reference to the indictment or presentment or the person so removed as aforesaid before the Justices and Judges of Oyer and Terminer and gaol delivery acting by virtue of this act, in like manner as if such recognizance had been originally entered into for prosecuting such offence, appearing, or giving evidence, or doing such other things before the said Justices and Judges of Oyer and Terminer and gaol delivery: provided that in cases of removal from the jurisdiction of justices of the peace for the said cities of London or Westminster, the liberty of the Tower of London, the borough of Southwark, or counties of Middlesex and Surrey, two days notice, and in case of removal from the jurisdiction of the justices of the peace for the counties of Essex and Kent one week's notice, shall have been given either personally or by leaving the same at the place of residence as of which the parties bound by such recognizance are therein described, to appear before the Court of Oyer and Terminer and gaol delivery instead of the said other justices: provided also, that it shall be lawful for the Court, Judge, or Recorder, who shall grant such writ of certiorari or habeas corpus, and it is hereby required that such Court, Judge, or Recorder, shall cause the party applying for such writ or writs, whether he be the prosecutor or party charged with such offence, to enter into a recognizance in such sum, and with or without sureties, as the Court, Judge, or Recorder may direct, conditioned to give such notice as aforesaid to the parties bound by such recognizance to appear before the said Court of Oyer and Terminer and gaol delivery instead of before the said other justices respectively, and to do such other things as such Court, Judge, or Recorder shall direct."

Sect. 19. Justices of peace may deliver over indictments found at sessions to the Justices of Oyer and Terminer and gaol delivery.

Sect. 20. Justices to settle officers' fees, or a salary, and direct how the same shall be paid.

Sect. 21. Sessions of the peace, not to be affected by the sessions holden in pursuance of this act.

Sect. 22. "That it shall and may be lawful for the Justices and Judges of Oyer and Terminer and gaol delivery to be named in and appointed by the commissions to be issued under the authority of this act, or any two or more of them, to inquire of, hear, and determine any offence or offences committed or alleged to have been committed on the high seas, and other places within the jurisdiction of the admiralty of England, and to deliver the gaol of Newgate of any person or persons committed to or detained therein for any offence or offences alleged to have been done and committed upon the high seas aforesaid within the jurisdiction of the admiralty of England; and all indictments found and trials and other proceedings had and taken by and before the said Justices and Judges of Oyer and Terminer and gaol delivery shall be valid and effectual to all intents and purposes whatsoever: and that it shall and may be lawful for any three of the said Justices and Judges of Oyer and Terminer and gaol delivery to order and

Certificate. See *tit. Attorney—Bankrupt—Costs—Game—Marriage—Ship and Shipping.*

Certiorari*.

I. WHEN IT LIES.

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- (b) INQUISITIONS, p. 515.
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II. TO WHAT COURT IT LIES.

- (a) TO INFERIOR COURT, p. 518.
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- (d) TO COUNTY COURT, p. 523.
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III. FOR WHOM IT LIES, p. 526.

direct the payment of the costs and expenses of such prosecutions in manner prescribed and directed by the before-recited act of the seventh of George the Fourth."

Sect. 23. "That nothing in this act contained shall extend or be construed to extend to prejudice or affect the rights, interests, privileges, franchises, or authorities of the lord mayor, aldermen, and recorder of the city of London, or their successors, the sheriffs of the city of London and county of Middlesex, for the time being, or to prohibit, defeat, alter, or diminish any power, authority, or jurisdiction which at the time of making this act the said lord mayor, aldermen, and recorder, for the time being, of the said city, did or might lawfully use or exercise; and that, notwithstanding any practice or custom of the said city of London to the contrary, it shall be lawful for the Lord Mayor's Court of the city of London to sit on any day on which any session of the peace, oyer and terminer and gaol delivery shall be held within the said city; and that all proceedings of the said Lord Mayor's Court, that could or might have been had or taken if such sessions were not held, shall and may be had and taken, any practice, custom, or law to the contrary notwithstanding."

Sect. 24. Commencement of act.

Sect. 25. Act may be altered this session.

Sect. 29. This act to be a public one.

* A writ of certiorari is an original writ issuing out of the Court of Chancery, or the King's Bench, Common Pleas, or Exchequer, directed in the King's name to inferior judges or officers, commanding them to certify or to return the record of a case depending before them, to the end that the party may have the more sure and speedy justice before the King, or such justices as he shall assign to determine the cause. (1 Bac. Ab. 349; F. N. B. 245; Com. Dig., tit. *Certiorari*; Tid. Prac. 397, 9th ed.). When it issues out of Chancery it is returnable in that Court, and the record when brought up, if required in any other court, must be sent there by mittimus. (Tid. Prac. 3, 9th ed.).

IV. APPLICATION FOR.

- (a) TIME OF APPLYING FOR, p. 527.
- (b) NOTICE OF APPLYING FOR, p. 529.
- (c) OF AFFIDAVIT FOR, p. 531.
- (d) OF RECOGNIZANCE, p. 532.

V. OF THE RETURN, p. 534.

VI. OF BAIL ON, p. 534.

VII. OF QUASHING WRIT, p. 535.

VIII. OF PROCEEDINGS AFTER RETURN, p. 535.

IX. OF COSTS ON, p. 535.

I. WHEN IT LIES.

(a) OF RATES.

REGINA v. JUSTICES OF MIDDLESEX, H. T. 1839. Q. B. 9 *Ad.*
& E. 540; S. C. 1 *P. & D.* 402.

AN application was made for a certiorari to remove a rate made pursuant to a local act, on certain grounds which did not appear on the face of the rate, and which were constituted by the act grounds of appeal to the quarter sessions—

Per Cur.—The rate is admitted to be good on the face of it; and the power of appeal comprehends the very objection made upon affidavit. The certiorari cannot issue.

See 5 T. R. 346.

If a rate is good on the face of it, the Court will not grant a certiorari to remove it on a ground which may be the subject of appeal.

(b) OF INQUISITIONS.

REGINA v. SHEFFIELD AND MANCHESTER RAILWAY COMPANY,
 M. T. 1839. 11 *Ad. & E.* 194; S. C. 3 *P. & D.* 111.

BY the provisions of a railway act, (7 Will. 4, c. xxi., local and personal), in case the company should not be able to agree with the owners of land upon the price to be paid for it, the company were to issue their warrant to the sheriff of the county in which the lands were; and, if such sheriff should be interested in the question, to any of the coroners of the county; or, if they should be interested, then to some other person who had served one of the above offices and should not be interested, to empanel a jury to appear before such sheriff, under-sheriff, coroner, or other person, for the purpose of assessing and giving a verdict for the sum of money to be paid; such sheriff, under-sheriff, &c., to give judgment for the sum assessed, which was to be binding and conclusive; the verdicts and judgments, being first signed by the sheriff, under-sheriff, &c., to be deemed records to all intents and purposes. By section 220 it was pro-

Where an inquisition under a railway act was taken before a deputy appointed by the sheriff for that purpose, although not authorized so to do by the act, the Court refused a certiorari to remove the inquisition.

vided, "that no proceeding to be had or taken in pursuance of this act shall be quashed or vacated for want of form, or be removed by certiorari, or by any other writ or proceeding whatsoever, into any of his Majesty's Courts at Westminster or elsewhere, any law or statute to the contrary notwithstanding." An inquisition was taken before a person whom the sheriff appointed as his deputy to take it. On a motion to remove the inquisition by certiorari—

Per Cur.—The question is, whether this inquisition was in pursuance of the act; and we think it was. The proceedings were properly instituted, and the case launched for trial. The irregularity that afterwards occurred, when the proceedings were duly set in motion, appears to us to be one of the interlocutory proceedings that this Court ought not, and has no power, to interfere with.

We do not mean to express any opinion that the sheriff was right in allowing these proceedings to be taken in his absence, for we do not see any power given him by the act to appoint a deputy-sheriff for that purpose; but, by the 3 & 4 Will. 4, c. 42, authorizing writs of trial, the sheriff is authorized to appoint a deputy; and as to writs of inquiry, it would appear by *Denny v. Trappell*, (2 Wils. 378), that the sheriff may appoint one deputy for each writ of inquiry.

See 1 P. & D. 170, n.; 3 N. & M. 802; 5 B. & C. 816; S. C. 6 E. & R. 469; 5 T. R. 629; 2 Ld. Ken. 299; 3 B. & C. 693; S. C. 5 D. & R. 538; 3 D. & R. 35; 1 Ad. & E. 563; 1 P. & D. 88; 2 N. & P. 457.

REGINA v. BRISTOL AND EXETER RAILWAY COMPANY, M. T. 1838. 11 Ad. & E. 202; S. C. 1 P. & D. 170.

So, where a jury, sitting on an inquisition to assess damages under a railway act, were taken from the common jury list, instead of the special jury list, as required by the act, and assessed compensation for land taken beyond the line limited by the act, a clause in the act taking away the certiorari in respect of all proceedings taken under it, the Court refused a certiorari, notwithstanding the objections.

By the Bristol and Exeter Railway Act, (6 Will. 4, c. 36), the company were not to deviate more than 100 yards from the line marked out in the maps deposited with the clerk of the peace, and all disputes respecting damage done to any mansion were to be tried by such persons as usually sit on *special juries*. There was a clause taking away the certiorari in respect of all proceedings taken in pursuance of the act. The affidavits of the prosecutor shewed that part of this land, for which compensation had been assessed by the inquisition, was 129 yards from the line delineated in the maps, &c., that the prosecutor's mansion would sustain damage by such deviation, and that, although such damage was one of the matters in dispute, it had been inquired into by such persons as would ordinarily sit upon a *common jury*.

Per Cur.—The very object of taking away the certiorari was to prevent such an application as the present. According to the argument of the prosecutor, the smallest deviation from the line authorized by the act would be a fit ground for interference. Here there was jurisdiction substantially, though it was exceeded in some respects; and even if there was no jurisdiction, a certiorari is not necessary to give relief, as there will be a remedy by action of trespass.

See 5 Ad. & E. 563; S. C. 1 N. & P. 32; 5 T. R. 629; 5 B. & C. 816; S. C. 6 D. & R. 469; 2 Ad. & E. 241; S. C. 4 N. & M. 252; 1 Ad. & E. 563.

REGINA v. COMMITTEE-MEN OF SOUTH HOLLAND DRAINAGE,
T. T. 1838. Q. B. 8 *Ad. & E.* 429; S. C. 1 *P. & D.* 79.

ON an application to remove an inquisition by certiorari, on the ground that it did not set forth that the forty days' notice, required by the local act to be given to the party interested in the property, had been so given, or that it had been waived, it appeared that the party applying had requested that the inquisition might be held before the expiration of the forty days provided by the act.

Per Cur.—The ground of our decision is, that this party is not competent to make the objection which he now brings before us. We cannot doubt that the inquisition would have been free from the defect created by want of due notice, if the party had not himself waived it, requesting for his own benefit that the inquiry might take place at an earlier period than that which a regular notice would have assigned.

See 4 *Burr.* 2244; 1 *Burr.* 377; 7 *T. R.* 363; 5 *Ad. & E.* 563.

And if a party by his conduct waives a notice of an inquisition provided by an act of Parliament, he cannot afterwards obtain a certiorari to remove that inquisition for the purpose of quashing it, on the ground that it does not set forth the required notice or a waiver of it.

(c) OF INDICTMENTS.

REX v. JOULE, M. T. 1836. K. B. 5 *Ad. & E.* 539; S. C. 1 *N. & P.* 28; 5 *D. P. C.* 435.

ON an application to remove an indictment for obstructing a common highway, it was sworn by the defendant that he "is advised and believes that it will be proper, as well on account of the value of the object of the indictment, as of the questions of matter of fact and points of law which may arise, to have the same indictment tried by a special jury."

Per Cur.—You must shew specific grounds upon which legal difficulties will arise. The practice of allowing removals has perhaps been too lax*.

In order to obtain a certiorari for the removal of an indictment from the quarter sessions, because difficult points of law are likely to arise, the specific grounds on which they are likely to arise must be shewn.

(d) OF DISTRESS WARRANT†.

* The writ of certiorari at the instance of a *defendant* is taken away by the 25 Geo. 2, c. 36, s. 10, in the case of an indictment for keeping a gaming-house. (*Rex v. Fox*, 5 *D. P. C.* 242). A defendant in an indictment for a misdemeanor surreptitiously obtained an acquittal, by not complying with the practice of the sessions, in giving notice of trial, and bringing on the indictment for trial, after disposing of the felonies; but this Court would not grant a certiorari to remove the indictment, in order to set aside the verdict. (*Reg. v. Unwin*, 7 *D. P. C.* 578). Where a magistrate is indicted at a quarter sessions, he being in the commission for the county, and he has circulated among the other magistrates a printed account of the charges brought against him, it is a good ground within the 5 & 6 Will. 4, c. 33, s. 1, for removing the indictment by certiorari. (*Reg. v. Grover*, 8 *D. P. C.* 325). The certiorari, in all indictments for obtaining money by any false pretence, is taken away by 7 & 8 Geo. 4, c. 29, s. 53. (*Reg. v. Butcher*, 9 *D. P. C.* 135). The rule for removing an indictment, for non-repair of a road, from an inferior jurisdiction, is nisi in the first instance; (*Rex v. The Inhabitants of Leeds*, 5 *D. P. C.* 123); but in *Reg. v. Spencer*, (8 *D. P. C.* 127), it was held, that in order to remove an indictment for a misdemeanor by certiorari into this court, the rule is absolute in the first instance; but in the case of a felony, it is nisi. (*Ib.*).

† The Court will not grant a certiorari to remove a warrant of distress to levy poor's rates. (*Ex parte Taunton*, *Ib.* 54).

II. TO WHAT COURT IT LIES.

(a) TO INFERIOR COURT*.

(b) TO QUARTER SESSIONS.

REGINA *v.* COMMISSIONERS FOR PAVING CHELTENHAM, E. T.
1841. Q. B. 1 *Gale & D.* 167.

Although a statute takes away the certiorari for the removal of proceedings by magistrates under it, that does not prevent the removal of an order of quarter sessions, where justices interested in the matter have voted in support of the order.

ON dismissing a rule for quashing an order of quarter sessions quashing a rate made on the occupiers of certain property in Cheltenham, pursuant to 1 & 2 Geo. 4, c. cxxi, (local and personal, public), which had been brought up by certiorari, various facts were shewn, the result of which was, that several magistrates had voted at the quarter sessions on the occasion of quashing the rate, who were interested in the property rated either directly or indirectly. It was objected, that s. 136 of the local act, under which the rate was made, provided, "that no order, verdict, rate, assessment, judgment, conviction, or other proceeding, touching or concerning any offence against this act, or any bye-law or order in pursuance thereof, shall be quashed or vacated for want of form only, or be removed or removable by certiorari, or any other writ or proceeding whatsoever, into any of his Majesty's Courts of Record at Westminster."

Per Cur.—If a case of malversation is made out against the justices, the certiorari clause will not preclude our interference. We have no doubt that this court has power to declare null and void the proceedings of any inferior court which are brought about by malversation. The certiorari clause in a statute assumes, that the order or judgment in question has been the act of the proper authority lawfully constituted; and that cannot be the proper authority lawfully constituted which has been improperly brought together, and packed from unworthy motives. If, therefore, the case is established which is set up on the other side, the certiorari clause will be no obstacle to our seeing that justice is done†.

See 4 *B. & C.* 844; *S. C.* 7 *D. & R.* 334; 8 *B. & C.* 137; *S. C.* 2 *M. & R.* 172; 2 *Salk.* 607; 2 *Str.* 1173; 4 *T. R.* 71; 5 *B. & C.* 459; *S. C.* 8 *D. & R.* 217; 1 *P. & D.* 170, *n.*; 3 *P. & D.* 111; 1 *A. & E.* 563; *S. C.* 3 *N. & M.* 802; 5 *B. & Ad.* 138; 10 *A. & E.* 188; *S. C.* 2 *P. D.* 353.

* A judgment in an action of ejectment in an inferior jurisdiction, is not within the meaning of the 19 Geo. 3, c. 70, s. 11; therefore, if the defendant leaves the jurisdiction, the judgment cannot be removed into a superior Court. (*Doe d. Stamford v. Shipley*, 2 *D. P. C.* 408). The rule for a certiorari, under the 19 Geo. 3, c. 70, s. 4, is absolute in the first instance, and applies to all causes where the defendant removes himself and his effects out of the inferior jurisdiction. (*Knowles v. Lynch*, 2 *D. P. C.* 623). A rule for a certiorari to remove a record from an inferior jurisdiction, is absolute in the first instance. (*Pawsey v. Gooday*, 3 *D. P. C.* 605).

† The case of *Rex v. Justices of Monmouthshire*, 8 *B. & C.* 137; *S. C.* *nom. Uske*, (2 *M. & R.* 172), as far as it is intelligible from the report seems contrary to this decision, as there the Court refused to interfere by certiorari, although it was sworn, that a rated inhabitant, who was a justice, had voted in the proceedings at sessions on an appeal against an order of removal.

REGINA v. JUSTICES OF WEST RIDING OF YORKSHIRE, M. T.
1837. K. B. 2 N. & P. 457.

ON a motion to remove a recognizance which had been estreated by the quarter sessions, it appeared that a Dr. Thornton, with two other persons, entered in April into recognizances to keep the peace towards a particular person and all the Queen's subjects. On the 11th day of July following, Dr. Thornton was convicted of an assault before three justices at their petty sessions, and paid a fine of 5*l.* with costs. At the quarter sessions holden at Leeds in the month of October following, an application was made to the Court to estreat the said recognizance, upon proof of the conviction, a record of which was duly returned, and of the identity of the said applicant, and it was estreated accordingly. It was objected that the estreat was a nullity, as the sessions had no power to estreat such a recognizance under 3 Geo. 4, c. 46; the party applying could not, therefore, be considered as aggrieved by the estreat.

Per Cur.—We have been for some time in doubt whether the nature and quality of the act done by the sessions did sufficiently appear; it having been contended, in opposition to the application, that the order of sessions was at least inoperative and harmless, whether legal or not. We think, however, upon further consideration, that what has been done is a grievance to the party applying.

See *M'Clel.* 111; 1 *M'Clel. & Young*, 27; 7 *B. & C.* 293; *Parker's Rep.* 54; *Cro. Car.* 498; 3 *Bulst.* 220; 1 *Rolle's Abr.*, tit. *Execution*, o, pl. 4, p. 900; 7 *Bac. Abr.* 513, tit. *Surety of the Peace*, h, 7th edit.; and tit. *Scire Facias*, (C. 2); *Cro. Jac.* 412.

A certiorari may be obtained to remove a recognizance which has been estreated by the quarter sessions, although that court has no power to estreat in that instance.

REX v. JUSTICES OF WEST RIDING OF YORKSHIRE, in the Matter
of the AIRE AND CALDER NAVIGATION, T. T. 1834. K. B.
1 *Ad. & E.* 563; S. C. 3 N. & M. 802.

IN this case an application was made for a certiorari to be issued to the Justices of the West Riding of Yorkshire to remove into this court the judgment pronounced by the justices at the general quarter sessions, upon the verdict of a jury empannelled before them under the provisions of 9 Geo. 4, c. xcvi, or why a mandamus should not issue commanding them to make up the same conformably to the legal effect of the said verdict and of the said statute, by striking out so much thereof as relates to the recompense thereby assessed and ascertained in respect of prospective damages. By 9 Geo. 4, c. xcvi, the undertakers of the Aire and Calder Navigation were authorized to make a certain tram-road, and were authorized to enter any lands required for that purpose, making satisfaction in the manner therein mentioned to the owners and all persons interested in the lands, &c., taken or prejudiced, for all damage sustained through the execution of the powers granted to the undertakers. In case of a dispute as to the amount of such purchase-money or compensation, the undertakers were required by section 20, to issue a warrant to the sheriff, commanding him to return a jury to appear at a court of general quarter sessions to be holden for the county, &c., in which the lands should lie or the dispute arise; and such jury were "to inquire of, assess, and ascertain the sum or sums of money to be paid for the purchase of such land, &c.; and also what other separate and distinct sum and sums should be paid by

Where a private act of Parliament takes away the certiorari for the removal of a proceeding under it before a court of quarter sessions, the K. B. will not grant a mandamus to amend the entry of that proceeding by the quarter sessions.

way of recompense, either for the damages which should *before that time have been sustained* as aforesaid, or *for the future, temporary, or perpetual continuance of any recurring damages which should have been so occasioned as aforesaid, and the time or occasion of which should have been only in part obviated, repaired, or remedied* by the said undertakers, and which could or would be no further obviated, repaired, or remedied by them." And the justices were directed "to give *judgment* accordingly for such purchase-money or recompense as should be assessed by such jury; which said *verdict* and the *judgment* to be thereupon pronounced *should be binding and conclusive against all bodies politic, corporate, or collegiate, and all other persons whatsoever.*" By a previous act of 1 Geo. 4, c. xxxix, passed for the purpose of enabling the undertakers of the Aire and Calder Navigation to make certain new cuts, it had been enacted, (s. 117), "That *no proceedings* to be had and taken in pursuance of that act should be quashed or vacated for want of form, or *be removed by certiorari or any other writ or process whatsoever* into any of his Majesty's courts of record at Westminster or elsewhere." By the 1st section of the 9 Geo. 4, c. xcviii, it was enacted, "That the act of 1 Geo. 4, c. xxxix, and all powers, provisions, exemptions, rules, remedies, regulations, penalties, forfeitures, articles, matters, and things whatsoever therein contained, (with certain exceptions), should be in full force and effect, and should extend to and be used, executed, applied, enforced, and put in execution, to all intents and purposes, as to that act and the several matters and things therein contained, for making and maintaining the cuts, canals, &c., to be made by virtue of that act, and for carrying the several purposes of that act into execution in as ample and beneficial a manner, to all intents, constructions and purposes whatsoever, as if the same had been respectively repeated and re-enacted in the body of that act and made part thereof." The course of the projected railway or tram-road of the undertakers intersected a railroad belonging to the Lake Lock Railway Company, and was proposed to be carried under it by means of a tunnel. The undertakers and the company not being agreed upon the sum to be paid to the latter for a piece of land required by the undertakers, (being a small portion of the land under their railway), and for any damage that might accrue to them, a jury was returned for the purpose of ascertaining the amount. They appeared and were sworn at the last Christmas sessions for the West Riding of Yorkshire; when, it being urged by the counsel for the company, and strongly insisted upon by the chairman, that the undertakers would have it in their power at any time entirely to destroy the company's railroad by making a chasm at the place where their tram-road ran underneath the railway of the company, the jury gave the following verdict:—

	£	s.	d.
"The eight perches of land we value at	6	0	0
Present damages	0	0	0
Future damages	2800	0	0"

The chairman recorded the whole verdict, and delivered the judgment of the court in conformity therewith. The judgment as entered by the clerk of the peace stated the finding of the jury as to past damages thus:—"And do also ascertain that *no separate and distinct sum of money shall be paid by way of recompense to the said proprietors for the damages before this time sustained by the execution of any of the powers granted in and by the said act.*"

The judgment awarded the payment by the undertakers of 2800*l.* in one sum forthwith.

Per Cur.—We have no doubt whatever that the certiorari is taken away as to proceedings under the second act. We do not very well see what stronger words could have been used for the purpose of embodying in one act all the provisions of a former act, than those which are used in the first clause in the act of 9 Geo. 4, c. xcviii. The object of taking away the certiorari is to prevent this Court from questioning the correctness of the proceedings of the court below; and if we were to grant a mandamus to the justices to enter up judgment according to the legal effect, we should by a side wind get rid of the clause which takes away the certiorari. But, independently also of that consideration, we think this Court has no jurisdiction whatever to order the justices to enter up judgment according to the legal effect of the verdict; for that would be a direction to the justices to do a thing contrary to the act of Parliament, which requires them to give judgment for such purchase-money and recompense as shall be assessed by the jury. If the assessment of these future damages be void, it will be void to all intents and purposes, and may be treated as a nullity; but we do not mean to give any opinion as to whether the jury were *authorized* in giving recompense for such *future* damages. That question may be the subject of consideration on some future occasion. We are quite clear that we cannot interpose either by way of certiorari or by way of mandamus.

See 2 T. R. 737; 2 Dougl. 553; 1 B. & Adol. 380.

REGINA *v.* JUSTICES OF RIPON, M. T. 1837. Q. B. 7 *Ad. & E.* 417; S. C. 2 N. & P. 411.

ON an application for a certiorari to remove an order of sessions, made on an appeal against a borough rate, the question was, whether, under the 5 & 6 Will. 4, c. 76, s. 132, the certiorari was taken away.

Per Cur.—This was a motion for a writ of certiorari to remove an order of sessions, quashing on appeal a rate, in the nature of a county rate, made by the town council of the borough of Ripon, under the 92nd sect. of 5 & 6 Will. 4, c. 76. We are of opinion, that the 132nd section of the same act takes away the writ of certiorari. It is general in its terms, and enacts, "That no conviction, order, warrant, or other matter, made, or purporting to be made, by virtue of this act, shall be removed by certiorari." Now, it is clear, that this order of sessions is made by virtue of the act; and though, by the 92nd section, the borough rate is to be made in the same manner as a county rate, or as near thereto as the nature of the case will admit, and a county rate may be removed, yet that consideration does not remove the effect of the 132nd section.

See 1 N. & P. 756; 2 T. R. 89; 2 T. R. 735; 5 B. & Ald. 773; 1 N. & P. 32.

REGINA *v.* JUSTICES OF CHESHIRE, M. T. 1838. Q. B. 8 *Ad. & E.* 398; S. C. 1 P. & D. 88.

ON an appeal against an order of removal to the parish or township of C., the respondents took an objection to the notice of the

The certiorari to remove orders of quarter sessions on appeals against borough rates, is taken away by 5 & 6 Will. 4, c. 76, s. 132.

The Court will not grant a cer-

tiorari to remove an order of quarter sessions, where it appears that the order is good on the face of it, and that the court has jurisdiction to make it.

grounds of appeal, which the Court held was valid; but, on looking at the order of removal, one of the justices stated, that C. was wrongly described, as there was no township of C. maintaining its own poor, but that C. was divided into three townships, each maintaining its own poor separately; the sessions held thereupon, that the order was a nullity, although the respondents contended that the sessions had no jurisdiction, and that the original order should be confirmed.

Per. Cur.—The simple question here being, whether the justices had jurisdiction; we can entertain no doubt that they had. The appeal being lodged, an objection was taken to the notice, which was held bad, and it is contended, that at that moment the appeal went out of Court; but that is said, without attending to the words of the act. If there had been any doubt as to the jurisdiction of the sessions, the counsel for the respondents appear to have helped them out of the difficulty by applying to have the order confirmed.

See 4 B. & Ald. 86; 4 B. & C. 844; S. C. 7 D. & R. 334; 8 B. & C. 137; S. C. 2 M. & R. 172; 1 M. & S. 446; 4 Burn's Just., 1202, *ed. by D'Oyly & Williams*; 4 A. & E. 695; 2 A. & E. 241; S. C. 4 N. & M. 252; 2 East, 244; 5 B. & C. 816; 5 B. & C. 818, *n.*; 5 T. R. 629; 3 East, 342; 1 Cowp. 139; 2 Ld. Ken. 164; 1 M. & P. 703; 3 N. & P. 406.

REGINA *v.* JUSTICES OF LANCASHIRE, M. T. 1839. Q. B. 11 Ad. & E. 144; S. C. 3 P. & D. 86.

An order made by county justices, authorizing contracts with the council of a borough to maintain borough prisoners, though made in pursuance of 5 Geo. 4, c. 85, s. 1, and the 5 & 6 Will. 4, c. 76, s. 114, is virtually under the former act, and therefore the certiorari is not taken away by s. 132 of the latter statute.

A MOTION was made to remove the following order of county quarter sessions, by certiorari:—"This Court, in pursuance of the provisions of the 5 Geo. 4, c. 85, and 5 & 6 Will. 4, c. 76, doth empower the visiting justices of the house of correction at Salford, or any two of them, (of whom the chairman of the visiting justices shall be one), to contract with the town council of the borough of Manchester for the support and maintenance in the said house of correction, of any prisoners committed thereto for the said borough on criminal charges, for such term and under such conditions as the said visiting justices and council shall mutually agree upon, so as no such prisoner shall be committed to the said house of correction for any term exceeding six calendar months." It was contended, that the certiorari had since been taken away by the 5 & 6 Will. 4, c. 76, s. 132—

Per Cur.—With regard to the certiorari being taken away, it is clear that the subject-matter of this order is entirely under the 5 Geo. 4, c. 85; and, although the persons who are enabled to make the contract are altered by 5 & 6 Will. 4, c. 76, still, as the substance of the order is under the former act, it is impossible to hold that the order is made under the latter statute.

See 4 B. & Ald. 289; 3 B. & Ad. 250; 3 B. & Ad. 887; 7 A. & E. 417; S. C. 2 N. & P. 411; 4 Rep. 32 b.; 9 Rep. 117 b.

(c) TO CENTRAL CRIMINAL COURT*.

* The Central Criminal Court Act, 4 & 5 Will. 4, c. 36, s. 16, (see the act, ante, p. 509,) does not affect the removal of indictments from that Court into the Queen's Bench. Such removal is entirely regulated by the 5 & 6 Will. 4, c. 33,

REX v. TEMPLAR and Others, M. T. 1838. K. B. 1 N. & P. 91;
S. C. 5 D. P. C. 249.

On an application for a certiorari to remove an indictment for a conspiracy to defraud, by passing off an unsound horse for a sound one, it was suggested that the indictment was bad in law.

Per Cur.—We do not think that the circumstance of the indictment being a bad one, is a sufficient ground for removing it from the Central Criminal Court. If it is bad, that Court can deal with it as well as this. We are not desirous of encouraging applications of this sort.

See 1 Stark. 402.

It is not a ground for removing an indictment by certiorari from the Central Criminal Court, that it may be bad in law,

REX v. WARTNABY, H. T. 1835. K. B. 2 Ad. & E. 435.

In this case, an indictment had been preferred and found at the Central Criminal Court for perjury, alleged to have been committed by the defendant in an answer in Chancery. On an application to this Court to remove it by a certiorari—

Per Cur.—On considering the nature of the document in the proceedings in Chancery, we think the writ should go.

but the Court granted a certiorari, to remove from the Central Criminal Court an indictment for perjury, alleged to have been committed in an answer in Chancery.

(d) TO COUNTY COURT.†

EDWARDS v. BOWEN, H. T. 1826. K. B. 5 B. & C. 206; S. C. 7 D. & R. 709.

A MOTION was made to quash a writ of certiorari and return thereunto, whereby a plaint in replevin had been removed from the county court of Carmarthen into this Court.

Per Cur.—It may be matter of discretion for this Court, where the plaint has been removed as in this case by certiorari, whether they will quash the writ or not, as some of the authorities cited shew; but in the present case we think we ought, in the sound exercise of that discretion, to quash the writ; for we see no reason why we should allow the plaintiff to come per saltum, and remove his suit by certiorari from the Sheriff's court into this Court, without first removing it by recordari facias loquelam into the Court of

A certiorari cannot issue to remove a plaint from the county court of Wales into the K. B.

(the Certiorari Act); and a defendant removing such indictment under the latter statute, becomes liable in case of conviction to pay to the prosecutor the costs occasioned by such removal. (*Reg. v. Hawden*, 9 D. P. C. 1007). The Court of King's Bench will, under special circumstances, remove an indictment for a misdemeanor from the Central Criminal Court. (*Rex v. Caldecott*, 3 D. P. C. 315). In order to support a motion for a certiorari, to remove an indictment for perjury from the Central Criminal Court, it must be shewn that points of difficulty are likely to arise on the trial of the indictment. (*Reg. v. Josephs*, 8 D. P. C. 128). In M. T., 1834, in *Rex v. Brian and Others*, the Court refused an application by the defendants to remove an indictment from the Middlesex quarter sessions, on the ground of its vagueness, as it charged the defendants with conspiring to obtain goods and chattels as common cheats, without stating from whom. (*See Rex v. Gill*, 2 B. & Ald. 204; *Rex v. Fowle*, 4 C. & P. 592).

† Where a defendant, who has improperly sued out a certiorari, instead of a re. fa. lo., or pone, seeks to quash his writ, no step having been taken on it, the rule is absolute, for that purpose, in the first instance. (*Ruffman v. Thornwell*, 7 D. P. C. 613).

Great Sessions, which is a fit and competent jurisdiction for the trial of it*.

See 2 Dow. & R. 407; 5 Ib. 445; 2 Dougl. 748; 2 Ib. 750, n.; 2 Ib. 35; 2 T. R. 89, 285; 4 T. R. 499; 8 T. R. 536.

(e) TO COURT OF REQUESTS†.

(f) TO MAGISTRATES.

ANONYMOUS, M. T. 1830. K. B. 1 B. & Ad. 382.

The Court refused a certiorari to bring up a conviction for a common assault, under the 9 Geo. 4, c. 31, s. 27, on the ground of an alleged excess of jurisdiction, the conviction itself shewing no excess of jurisdiction, and the depositions disclosing none.

IN this case an application was made for a certiorari to remove a conviction of justices under the 9 Geo. 4, c. 31, s. 27, for a common assault. It was suggested that the inquiry before the magistrates convicting was really a charge of an assault with intent to commit felony. By the provisions of s. 29, the justices were precluded from entertaining any such inquiry. The depositions, it was contended, shewed that the charge in question was one for an assault with intent to commit a felony, and not a common assault. The justices having therefore exceeded their jurisdiction, the conviction was bad.

Per Cur.—The conviction here shews a jurisdiction on the face of it, and we should feel great difficulty, in any such case, in granting the writ; but under the present circumstances we are of opinion that it ought not to issue. The conviction is of a common assault, on section 27 of the act; and it is assumed, for the purpose of this application, that the charge was one of assault with intent to commit felony. But by the 29th section it is left to the discretion of the justices to find whether the assault was or was not accompanied by any attempt to commit felony. They have negatived such attempt; and it is not clear, from the language of the deposition made before them, that the acts complained of, admitting the statement to be correct, were such as shewed an intention to commit felony.

REX v. FELL, M. T. 1830. K. B. 1 B. & Ad. 380.

The certiorari, in cases of convictions under

ON an application for a certiorari, to bring up a conviction of the defendant under the 6 Geo. 4, c. 63, for employing children in a cotton factory at improper hours, it appeared that by 43 Geo. 3, c.

* Since the 11 Geo. 4 & 1 W. 4, c. 70, s. 13, it is presumed that such a writ could issue, as by that it is provided that "the jurisdiction of his Majesty's Courts of King's Bench, Common Pleas, and Exchequer respectively, and of the several Judges and Barons thereof, shall extend and be exercised over and within the county of Chester and the city of Chester, and the several counties in Wales, in like manner, to the same extent, and to and for all intents and purposes whatsoever as the jurisdiction of such courts respectively is now exercised in and over the counties of England, not being counties palatine, any statute heretofore passed to the contrary notwithstanding."

† Where a plaint is removed by certiorari out of the Brighton court of requests into the Queen's Bench, the affidavit used on an application in the cause so removed may be entitled in the Queen's Bench. (*Franks v. Wicks*, 9 D. P. C. 489). When the judge of that court, in his return to the certiorari, omits some of the proceedings which have taken place with respect to the plaintiff's claim, the omission may be supplied by affidavit. *Ib.*

73, penalties were imposed on masters working children in cotton mills more than a certain time during the day, and the certiorari was taken away. By 6 Geo. 4, c. 63, s. 15, it is provided, "That all and every the powers, *provisions*, exemptions, penalties, forfeitures, payments, remedies, matters, and things respectively contained in the said hereinbefore recited acts, altered, or otherwise provided for by them, shall respectively be as good, valid, and effectual for carrying this act into execution, as if the same had respectively been repeated and re-enacted in the body of this act." The question was, whether this provision embodied within the second act the clause in the previous act abolishing the certiorari.

Per Cur.—The clause of 43 Geo. 3, c. 73, taking away the certiorari, must be considered as a "provision" embodied in 6 Geo. 4, c. 63, by section 15, "for carrying this act into execution."

See Dougl. 553, *n**.

the 6 Geo. 4, c. 63, for employing factory children at improper times, is abolished by reference to its provisions to those of 43 Geo. 3, c. 73.

(g) TO COMMISSIONERS.

REX v. LONG, M. T. 1827. K. B. 1 M. & R. 139.

ON an application for a certiorari to remove a conviction, under 52 Geo. 3, c. 93, for unlawfully using a dog and a gun, at Dirham and Hinton, in Gloucestershire, it appeared that the district within which the place where the offence was committed was situated, was not stated, and it was not alleged that the commissioners pronouncing the conviction had jurisdiction over the district in which that place was situated. No affidavit of want of jurisdiction by the commissioners was produced. By sect. 15 of the above statute the certiorari was taken away.

Per Cur.—The statute directs, that no "conviction of such commissioners, or justice, shall be removable, by any process whatever, into any other Court." The object of the legislature was to avoid those questions which might be raised in this Court upon a certiorari. Now, if the conviction were removed by certiorari into this Court, it would be competent to the party convicted to take the objections which have now been urged. In other cases, where the want of jurisdiction is shewn by affidavit, the rule as to the certiorari being taken away does not apply. If it were made out by affidavit, that the place where the offence was committed was not within the district, we should say that a certiorari ought to issue.

See 1 *East*, 278; 13 *East*, 139; 14 *East*, 267; 2 *D. & R.* 212; *S. C.* 1 *B. & C.* 100, and the note, p. 107; 7 & 8 *Geo.* 4, c. 29, s. 71; 52 *Geo.* 3, c. 93, s. 15; 15 *East*, 333; 5 *D. & R.* 538; 3 *B. & C.* 698; *S. C.* 16 *East*, 13; 8 *D. & R.* 733; *S. C.* 5 *B. & C.* 816.

If the jurisdiction of commissioners under the 52 Geo. 3, c. 93, to convict for unlawfully using a dog and gun, appears on the face of the conviction, the Court will not grant a certiorari unless it is sworn that they have no jurisdiction.

* Where a rule nisi for an attachment against a clerk of assize for not returning a certiorari has been discharged, on the ground that it was not shewn by the affidavit in support of the application, that the clerk was a commissioner of oyer and terminer, the Court will not grant another rule for an attachment in respect of the same default, or a rule requiring the clerk to return the same writ of certiorari. (*Reg. v. Harland*, 8 D. P. C. 323).

III. FOR WHOM IT LIES*.

REX v. BOULTBEE, II. T. 1836. K. B. 4 *Ad. & E.* 498; S. C. 6 *N. & M.* 26.

A clause in a statute taking away the certiorari, neither binds the Crown nor those prosecuting in its name, unless it is so expressly provided.

ON an application to remove an order of sessions quashing a conviction, under 1 & 2 Will. 4, c. 32, s. 30, for unlawfully entering in the day-time on certain land in search of game, it was objected, that by s. 45 the certiorari was taken away. It was also contended, that even supposing the Crown itself, if proceeding for its own especial advantage, as in a proceeding under the Excise laws, not to be bound by such a clause, yet the prosecutor of such a proceeding in the name of the Crown must be bound.

Per Cur.—There is a section in the act, which declares that no summary conviction, in pursuance of the act, or adjudication made, or appeal therefrom, shall be quashed for want of form, or removed by certiorari or otherwise into any of his Majesty's superior Courts of record. The language of the section would appear, in the absence

* *Semble*, that the 19 Geo. 3, c. 70, s. 4, empowering the removal of judgments from inferior courts of record, does not apply to judgments obtained by defendants. (*Batten v. Squires*, 4 D. P. C. 53).

The following are the provisions of the 5 & 6 Will. 4, c. 23, on the subject of certiorari:—

"Whereas it is expedient to prevent prosecutors of indictments and presentments from vexatiously removing the same out of inferior courts into his Majesty's Court of King's Bench; be it therefore enacted, that, from and after the passing of this act, (25th August 1835), no writ of certiorari shall issue from the Court of King's Bench at Westminster for removing into that Court any indictment or presentment from any court of session, assize, oyer and terminer, or gaol delivery, or any other court, at the instance of the prosecutor or any other person, (except his Majesty's Attorney-General), without motion first made in the Court of King's Bench or before some Judge of that Court, and leave obtained to remove such indictment or presentment, in the same manner as similar motions may now be made, and leave given where such application is made on the part of defendants; any law, practice, or usage to the contrary in anywise notwithstanding."

Sect. 2. "And whereas it is expedient to extend the powers of an act passed in the fifth year of the reign of King William the Third and Queen Mary, intituled '*An Act to prevent delays of Proceedings at the Quarter Sessions of the Peace*,' be it therefore enacted, that, instead of the recognizance now by law required to be entered into before the allowance of a writ of certiorari, every person indicted or presented in any court of session, assize, oyer and terminer, gaol delivery, or any other court, who shall obtain a writ of certiorari for removing any indictment or presentment whatever into the Court of King's Bench, not being in custody for want of bail to answer such indictment or presentment, shall, before the allowance of such writ, enter into a recognizance before one of his Majesty's Justices of the Court of King's Bench, or before a justice of the peace of the county or place in which the offence is charged to have been committed, or in which such person shall reside, in such sum and with such sureties as the said Court of King's Bench, or one of his Majesty's Justices of the said Court shall by indorsement on the said writ order and direct; which recognizance shall contain the same conditions as are now by the said act, and another act passed in the eighth and ninth year of the reign of King William the Third, intituled, '*An Act to make perpetual and more effectual, an Act, intituled, 'An Act to prevent Delays at the Quarter Sessions of the Peace*,''' required in cases of indictments, removed from the general quarter sessions of the peace; and thereupon all the clauses and provisions contained in the said several acts with respect to costs or otherwise, shall extend to such last-mentioned recognizances; and every person being in custody for want of bail to answer the charge contained in such indictment or presentment, shall be detained in custody until the like recognizances as are hereinbefore directed to be entered into, (previous to the allowance of such writ of certiorari), shall have been entered into, or until such person be discharged by due course of law."

of any decisions, to deprive not only *individuals*, but the *Crown*, of any right to remove proceedings by certiorari. But it has been repeatedly held, that the Crown is not deprived of its right of removal by certiorari, by similar general language. After much fluctuation of opinion, it is settled, that the right of issuing a certiorari is not taken away from prosecutors in general, by language similar to that contained in this act.

See the 5 & 6 Will. 4, c. 33, *ante*, p. 526; 15 *East*, 383; *Cowper*, 78; 2 *Stra.* 1209; 6 *T. R.* 194; 5 *T. R.* 626; 3 *Nev. & Man.* 826; 1 *Ad. & E.* 836; *Acc. M.* 5, *E.* 4, *fo.* 7, *pl.* 15; *M.* 7, *E.* 4, *fo.* 16, *pl.* 11, *fo.* 22, *pl.* 25; *Heydon's Case*, 11 *Co. Rep.* 8 a.; *The Protector v. Geering*, *Hardres*, 85, 99.

IV. APPLICATION FOR.

(a) TIME OF APPLYING FOR*.

REX v. BLOXAM, E. T. 1834. K. B. 386. 1 *Ad. & E.* 386; S. C. 3 *N. & M.* 385.

THIS was a rule for quashing a certiorari, and issuing a *procedendo*. It appeared that one James Smith having been convicted by the defendant, a magistrate for the county of Warwick, under 5 Geo. 4, c. 83, s. 14, as an idle and disorderly person, appealed to the Warwick Sessions, held in December 1831. And upon the hearing of the appeal the sessions quashed the conviction, subject to a case for the opinion of this Court. The defendant obtained a certiorari for the removal of the orders and proceedings of the sessions into this Court, and upon that occasion entered into the usual recognizance for prosecuting the certiorari. In April 1833, this Court sent the case back to the sessions to be re-stated. At the sessions held in July 1833, the appeal was *re-heard*; and fresh evidence being adduced, the sessions *confirmed* the conviction, subject, however, to a case granted at the instance of the appellant. In Hilary Term, 1834, a period of six months having elapsed since the time of holding the sessions at which the conviction was confirmed, and no new certiorari having been obtained on the part of the prosecutor to remove the orders and proceedings of those sessions, the present application was made.

Per Cur.—Parties must take care to exercise a proper diligence; and if they are not prepared within six months, there is no power in the Court to extend the time. Then it is said there is already a certiorari—that is the question: we think there is not. The party against whom the first decision was, removed the judgment, because it was against him. In this case the defendant removed, in order that he might quash the order of the sessions. The order is sent back to be re-stated, and that must imply a power in the sessions to re-hear and enter again fully into the consideration of the case,

A certiorari must, under all circumstances, be sued out within six calendar months from the time of making the order of sessions; and if a certiorari has removed an order from one sessions subject to a case, and on a re-hearing the case at another sessions, an order is made, the certiorari issued to remove the first order cannot operate upon the second; but the party complaining of the second order must sue out a fresh certiorari within the time limited by the 13 Geo. 2, c. 18, s. 5.

* Where the sessions have granted a special case, which has not been settled for more than six months after being granted, the certiorari for removing the orders of magistrates and sessions must be sued out within six months from the time of granting the case. If it is not so sued out, this Court will not grant a mandamus to compel the sessions to enter continuances and hear the appeal. (*Rex v. Justices of Staffordshire*, 1 D. P. C. 484).

as upon a new trial. Upon the second trial, the sessions came to an opposite conclusion. It cannot be said that the party who has prevailed at the second trial is bound to remove proceedings which are in his favour, merely because he had complained of the first trial; or that the writ of certiorari, which was obtained before the second trial, can have the operation of removing into this Court proceedings which had not taken place at the time when it was issued. It will very frequently happen that it will not be necessary to have a second certiorari; for, if the second hearing convinces the magistrates that the first decision was right, there will be no necessity for making a fresh order. But where the sessions come to an opposite decision, it seems to us that the party complaining of that decision must bring it into this Court. As that has not been done in this instance within six months, pursuant to 13 Geo. 2, c. 18, s. 5, the party complaining cannot be heard now.

See 1 Burr. 283; Ib. 479; Ib. 832.

REX v. JUSTICES OF MIDDLESEX, M. T. 1836. K. B. 5 *Ad. & E.* 626; S. C. 1 *N. & P.* 92.

But an application for a certiorari may be made any time within six calendar months from making an order of quarter sessions confirming an order of justices made more than six months previous to the application.

ON an application for a certiorari to remove an order of sessions confirming an order of justices for stopping up a public footway, it appeared that the application was made more than six calendar months from the date of making the order of justices, but less than six months from the date of making the order of sessions. The question was whether the application was in time, pursuant to 13 Geo. 2, c. 18, s. 5.

Per Cur.—This certiorari being moved for within six months of the confirmation of the original order by the court of quarter sessions, is applied for in sufficient time; if it were not so, the consequence would be, the party would not have the two remedies to which by law he has a right. He has a right to have the merits determined by the sessions, and the legality of the order, in point of law, determined by this Court. There appears to be no direct authority that the period of time is to commence from the confirmation of the original order by the sessions, yet there is what amounts to the same thing. In *Rex v. Shepherd*, (3 B. & Ald. 414), the date of the original order is stated, which was more than six months before the certiorari was moved for; and although it does not appear from the report to have been adverted to in the argument, yet it is to be presumed the point did not escape the attention of the Court.

See 4 T. R. 281; 10 B. & C. 477; 1 M. & S. 734.

WAIT AND ANOTHER v. COOMBES, M. T. 1837. Ex. 6 *D. P. C.* 127.

Where there is a claimant in a proceeding by a foreign attachment, a joinder of issue with him is a joinder of issue within the meaning of 21 Jac. 1, c. 23,

ON a motion for an attachment against a recorder for not allowing a writ of certiorari, it appeared that the plaintiffs, Wait and James, entered a plaint in the Tolsey Court at Bristol, against a person of the name of Coombes, and thereupon a foreign attachment issued, and a return was made that there were certain oats, the property of Coombes, within the jurisdiction. Upon the 14th February, one Bruce filed his claim of property in the goods attached; and on the 1st of April the plaintiffs replied, denying his claim, and added

the similitur. The issue was entered by the plaintiffs on the 11th of May. Bruce's attorney swore, that on the 29th of June he was not aware of the replication being filed, or of the issue being entered. On the 29th of June, Bruce gave notice to the attorney of Wait and James that he did not accept the issue, and that he intended to apply for a certiorari. A court was held on the 12th of July, at which the certiorari was produced. The counsel for the plaintiffs objected to the allowance of the certiorari, on the ground that six weeks had elapsed since issue joined.

Per Cur.—If Bruce is a party to the suit, and he certainly comes in quasi garnishee, the certiorari is too late.

See 2 *Ld. Raym.* 837; 1 *Tidd*, 398; 1 *Roll. Abr. tit. Certiorari*, (c), 1; 12 *Mod.* 390.

LAVERACK v. BEAN, M. T. 1837. Ex. 3 *M. & W.* 62; S. C. 6 *D. P. C.* 111.

ON an application for a procedendo, on the ground that a certiorari had been allowed contrary to the provisions of 21 Jac. 1, c. 23, s. 2, it appeared that the action was commenced in the borough court of Kingston-upon-Hull. On the 6th of July an appearance was entered, but issue was not joined until more than six weeks afterwards. On the 15th of September, a certiorari, returnable the 2nd of November, issued to remove the cause into this Court. The certiorari was delivered to the judge before the jury were sworn, and he received it, and duly transmitted the record to this Court, where it was filed.

Per Cur.—There is no doubt the case falls within the statute of James. The Judge ought not to have received it; he was wrong in doing so, and must be corrected by the superior court.

See *Tidd's Prac.*, vol 1, p. 411, ed. 9; 2 *Burr.* 759; 6 *Bing.* 433.

s. 2, and therefore a certiorari must issue within six weeks after that joinder.

If a judge of an inferior court allows a writ of certiorari more than six weeks after issue joined, contrary to the 21 Jac. 1, c. 23, s. 2, a procedendo will issue, although the record has been returned and filed*.

(b) NOTICE OF APPLYING FOR†.

REGINA v. HOW AND OTHERS, M. T. 1839. Q. B. 11 *Ad. & E.* 159; S. C. 4 *P. & D.* 320; 9 *D. P. C.* 501.

ON shewing cause against a rule nisi for a certiorari to remove an order of justices for the appointment of overseers, it was objected that there was nothing to shew on the face of the notice the identity

A notice for a certiorari must shew that the notice is given

* Where an order of sessions has been returned to this Court under a certiorari, and a rule is then obtained to quash the order, it is a good preliminary objection to an argument on such rule, that no notice of it has been served on the justices who made the order, although served on the parties interested in supporting it. (*Regina v. Spackman, In re The Blandford Roads*, 9 *D. P. C.* 1060). In order to obtain a certiorari it is not sufficient to serve the notice, under 13 Geo. 2, c. 15, on one justice present at the sessions making the order, and another justice of the same county not present. (*Rex v. Rattislaw*, 5 *D. P. C.* 539).

† A notice of application for a writ of certiorari, signed in the name of a solicitor, who describes himself, "solicitor for the present churchwardens and overseers of Market Harborough," is sufficiently signed, pursuant to 13 Geo. 2, c. 18, s. 5. (*Regina v. Solly*, 9 *D. P. C.* 115). So, notice of an intended application for a certiorari to remove an order of justices in quarter sessions, made on the hearing of an appeal, stated the names of the appellant and of the respondent, and was signed by "J. B., attorney for the respondents;" and the notice was given to

by the party making the application, and his identity must be shewn by affidavit, as well as that of the justices served with those making the order; and consenting to the enlargement of the rule does not waive the objection.

of the party seeking to sue out the writ and the person whose signature was attached to it, as that person was merely described as "Edward Leake, assistant-overseer." Again, except by the identity of names, there was nothing to shew that the justices who made the order, and those on whom the notice was served, were the same persons. The justices had consented to the enlargement of the rule nisi.

Per Cur.—The statute requires proof on oath, that the party suing out the certiorari has given notice to the justices who made the order. We find no proof here, that the assistant-overseer is the party suing out the writ, either for himself or on behalf of others; nor does it appear satisfactorily that the justices who were served with notice were the justices who made the order. It is too much to say that the object of the statute has been attained by the appearance of the justices, or that their consent to the enlargement of the rule has waived the objection.

See 4 B. & Ald. 289; *3 B. & Ad.* 887; *9 D. P. C.* 524.

REX v. JUSTICES OF CAMBRIDGESHIRE, T. T. 1832. K. B. 3 B. & Ad. 887.

A notice of an application for a certiorari, "on behalf of the churchwardens and overseers," is not sufficient, if only signed by one churchwarden.

ON an application for a certiorari to remove an order of sessions, it appeared that the notice required by 13 Geo. 3, c. 18, s. 5, was given "on behalf of the churchwardens and overseers of the poor of the parish of," &c. It was only signed—"T. Wilkin, one of the churchwardens of the said parish." The question was, whether the notice was sufficiently signed.

Per Cur.—This is not such a notice as the statute requires. The justices might have had objections to Wilkin as the person applying for this writ, which they would not have to the other parish officers: the notice, therefore, is calculated to mislead them. They are entitled to have true information of the parties intending to sue out the certiorari.

See 4 B. & Ad. 289.

REX v. ABERGELE, M. T. 1836. K. B. 5 Ad. & E. 795; S. C. 1 N. & P. 235.—S. P. REGINA v. JUSTICES OF LANCASHIRE, 11 Ad. & E. 144; S. C. 3 P. & D. 86.

A notice on behalf of a parish by an attorney of an intention, to apply for a certiorari, is sufficient under 13 Geo. 2, c. 18, s. 5; but there must be sureties on behalf of

ON an application to quash a certiorari, two objections were made: 1st, that the notice of the application had been signed by the attorney on behalf of the parish, (13 Geo. 2, c. 18, s. 5); 2nd, that the sureties who had entered into recognisances previous to the allowance of the writ had entered into them only as inhabitants of the parish, and that there was no surety on behalf of the parish. (5 Geo. 2, c. 19, s. 2).

Per Cur.—We think the notice by the attorney on behalf of the parish is a sufficient notice by the parties within the meaning of the

three justices, who were sworn to have been present at the trial and hearing of the appeal:—Held, a sufficient notice under stat. 13 Geo. 2, c. 18, s. 5. (*Regina v. The Justices of Wilts*, 9 D. P. C. 524). It is not necessarily too late to object to the service of the notice after writ issued, although the consequence may be, that if the writ be quashed, it will be too late to sue out a fresh one. (Ib). It is competent for the parties in an appeal to object to the notice to justices previous to obtaining a certiorari. (Ib).

statute; and we are of opinion, that recognisances ought to be given here on behalf of the parish, and two sureties also. But nothing limits the time for doing this; and we think the rule ought to be enlarged, in order that the proper recognisances may be entered into.

See 3 B. & Ad. 887; 4 B. & Ald. 289; 4 T. R. 281.

in due time, the period for giving the sureties may be enlarged.

the parish, besides two other sureties, pursuant to 5 Geo. 2, c. 9, s. 2; and if the certiorari has been issued

REX v. JUSTICES OF KENT, H. T. 1832. K. B. 3 *B. & Ad.* 250.

A RULE absolute for a certiorari had been granted in this case to remove an order for diverting a highway, and the party suing it out abandoned the proceedings. An application was then made by another party, who claimed an interest in the subject-matter of the order.

Per Cur.—The words of the act, “Unless it be duly proved upon oath that the *said party or parties suing forth the same*, hath or have given six days’ notice,” are conclusive against the motion.

See 4 B. & Ad. 289.

If a party gives the notices required by 13 Geo. 2, c. 18, s. 5, in order to obtain a certiorari, and then abandons his proceedings, another party cannot issue the writ.

(c) AFFIDAVIT FOR.

REGINA v. MANCHESTER AND LEEDS RAILWAY COMPANY, T. T. 1838. 8 *Ad. & E.* 413; S. C. 3 *N. & P.* 439. 1 *Per. & D.* 164.

ON an application for a certiorari to remove an inquisition under a railway act, it was contended, that the objections to it not being *positively* stated *on oath* in the affidavit supporting the rule, or a copy of the inquisition set forth, sufficient materials were not placed before the Court to authorize it in granting the writ.

Per Cur.—A certiorari should issue in this case, if it appeared that the company had taken any thing from the applicant which ought not, under the powers of the act, to have been dealt with as the subject of an inquisition. But to make this appear, the inquisition should have been set out on affidavit; or, if a copy of it could not be obtained, the applicant for this rule should have stated his positive belief that the inquisition contained some particular thing unauthorized by the act. That course has not been adopted in this instance, by his stating that he “objects” that the inquisition does not contain the requisite notice to treat. If the objection itself be good, it is not presented to us properly; it amounts to no more than saying the objection is a *bonâ fide* objection.

The application was subsequently renewed on amended materials, and a rule *nisi* granted.

Per Cur.—It is clear that we must exercise a discretion as to granting a certiorari. The conduct of the party applying may be such as to preclude him from being entitled to it. The rule of practice, if not altogether universal and inflexible, is as nearly so as possible, that the Court will not allow a party to succeed on a second application who has previously applied for the very same thing without coming properly prepared. We are constantly acting on this principle, of which the convenience and the justice are apparent. In the first place, then, we think it most important that we should assert our right to a discretion in granting the writ of certiorari; and, secondly, we think that every party is to come at first fully

The affidavit supporting an application to remove an inquisition under a railway act should state *positively on oath* what the objections to it are, or set forth a copy of it; and if they are not so stated the Court will not allow the application to succeed or to be renewed on amended materials.

prepared with a proper case, and, if he fails to do so, must not afterwards renew the application with an amended case.

See 5 *Ad. & E.* 563; 6 *Ad. & E.* 355; 4 *Ad. & E.* 111; 1 *B. & C.* 101; 4 *Burr.* 2244; 7 *T. R.* 363; 3 *B. & C.* 649; 1 *Salk.* 263; *S. C.* 1 *Ld. Raym.* 454; 1 *Ld. Raym.* 469; 3 *Salk.* 80; 7 *Ad. & E.* 519; 5 *Ad. & E.* 780; 6 *Ad. & E.* 369, 370; 8 *Ad. & E.* 439.

EX PARTE PHILLIPS, H. T. 1835. K. B. 2 *Ad. & E.* 586.

A certiorari having issued, without an affidavit, or order of a judge, directed to a clerk of a court of requests, not a commissioner, to remove a plaint of debt levied there, the Court set it aside.

THIS was an application to set aside a certiorari which had issued to remove a plaint levied in the Hull court of requests, which had cognisance of debts under 5*l*. The writ had been obtained without filing an affidavit or procuring an order of a Judge for that purpose, and was directed to the clerk of the commissioners of that court, but who was not a commissioner himself.

Per Cur.—The writ must be set aside.

See 5 *B. & C.* 206; 2 *Bing.* 463; *S. C.* 10 *Moore*, 32, 171.

(d) OF THE RECOGNISANCE*.

REX v. BOXALL AND OTHERS, H. T. 1836. K. B. 4 *Ad. & E.* 513.

The 5 & 6 Will. 4, c. 33, as to writs of certiorari, has made no difference in the effect of a writ of certiorari in removing an indictment against several; and therefore though issued at the instance of certain defendants it will remove it against all; and the fact of the recognisances of the other parties being consequently discharged is immaterial.

Where a certiorari is issued at the instance of a prosecutor, it is not necessary for him to enter

AN application was made to issue a procedendo in a case where an indictment for conspiracy had been removed by certiorari from the Central Criminal Court. The defendants had entered into recognisances to try at that court. A writ of certiorari had been granted at the instance of two of the defendants who had entered into fresh recognisances, but the other defendants had not. The effect would be, that the recognisances at the Central Criminal Court would become discharged. The present application was made for a procedendo, unless the other defendants would give security.

Per Cur.—The practice is not altered by the late statute. Any one defendant may apply for a certiorari: and the circumstance that, by his obtaining it, the recognisances of the other defendants are discharged, may serve to guide the discretion of a Judge as to granting or withholding the writ, but is no ground for a procedendo.

REGINA v. SPENCER, H. T. 1839. Q. B. 9 *Ad. & E.* 485; *S. C.* 1 *P. & D.* 358.

ON application to quash a certiorari which had been allowed without the recognisances required by the 5 Geo. 2, c. 19, s. 2, being entered into, the question was, whether in this case, as the writ had been obtained at the instance of the prosecutor, they were necessary.

Per Cur.—The practice has been uniform for a great many years

* A rule called on the prosecutor of a certiorari, issued to remove an order of sessions, confirming, without appeal, an order of justices, made pursuant to 55 Geo. 3, c. 68, s. 2, for stopping up a foot-path, to shew cause why it should not be quashed, the recognisances required by 5 Geo. 2, c. 19, s. 2, not having been entered into previous to the writ being issued, although they were entered into after the allowance:—Held, that the statute only applied to cases where there was an appeal to the sessions, and not to cases where the order was confirmed without appeal; 2ndly, that the application should have been to quash the allowance, and not the writ itself; and the Court refused to mould the rule so as to quash the allowance. (*Regina v. Stephen Jones*, 9 D. P. C. 504).

to apply the statutable regulations for suing out a certiorari to defendants only, and we must not depart from that practice.

See 6 *N. & M.* 28.

REGINA *v.* HAWDON, M. T. 1839. Q. B. 11 *Ad. & E.* 143.

In this case the defendants were indicted for a libel, and in the indictment was introduced an additional count for a conspiracy. The indictment was removed by certiorari, the usual recognisances, pursuant to 5 & 6 *W. & M.*, c. 11, s. 3, having been entered into. The defendants were convicted on the count for the libel, but the prosecutor abandoned that for the conspiracy. The Master of the Crown Office allowed the prosecutor his costs on both counts. On a motion to review the taxation as to the costs of the count for conspiracy—

The Court made the rule absolute, as the defendant was only liable for the costs of the charge of which he was convicted.

into the recognisances required by the 5 *Geo.* 2, c. 19, s. 2.

If a defendant removes an indictment by certiorari, entering into the usual recognisances, he is only liable for the costs of those counts on which he is convicted.

REX *v.* NEWTON, HUNT AND OTHERS, T. T. 1837. K. B. 2 *N. & P.* 121.

On an application for a procedendo, it appeared that an indictment having been found at the Middlesex sessions against the defendants for a conspiracy, the defendant Hunt obtained a writ of certiorari, to remove the indictment into this Court, having entered into the necessary recognisances, pursuant to 5 & 6 *W. & M.*, c. 11, 8 & 9 *Will.* 3, c. 33, and 5 & 6 *Will.* 4, c. 33. The present application was made for a procedendo, unless the other defendants should appear, and plead during the present term, and take short notice of trial for the sittings after this term.

Per Cur.—The only instance in which time has been imposed on a defendant, who had removed an indictment by certiorari, was in *Rex v. Hunt*, (3 *B. & Ald.* 444), which was under very special circumstances, and could not be made the foundation for introducing a new practice.

If one of several defendants in an indictment has entered into the usual recognisances on obtaining a certiorari, he cannot be compelled to proceed sooner to trial than the usual practice requires, although delay in the trial of the others will be the consequence.

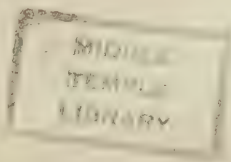
FURNISH *v.* SWANN, H. T. 1830. K. B. 10 *B. & C.* 458; S. C. 5 *M. & R.* 452.

In an action of trover, removed by certiorari from the Guildhall Court of Norwich, the damages being laid at 19*l.*, the defendant, on the removal, did not enter into the recognisances required by the 7 & 8 *Geo.* 4, c. 71, s. 6, to pay debt and costs, and an application for a procedendo was made.

Per Cur.—The enactment, requiring the recognisance to be entered into is general, and applies equally to actions of trover as to other actions. The record having been brought into this Court in direct contravention of the terms of an act of Parliament, which says that no such record shall be removed, unless the defendant shall have entered into the recognisance, cannot be retained; it must go back to the inferior court.

See 2 *Campb.* 525; 1 *Esp. N. P. C.* 31; *Clayton*, 122, *pl.* 114; 7 *D. & R.* 769; 2 *D. P. C.* 408.

On a removal from an inferior court of an action of trover, where the damages laid are less than 20*l.*, the recognisances to pay debt and costs, required by 7 & 8 *Geo.* 4, c. 71, s. 6, must be entered into.



V. OF THE RETURN*.

PALMER *v.* FORSYTH, T. T. 1825, K. B. 4 B. & C. 401; S. C. 6 D. & R. 497.

The Court quashed a return to a certiorari, on the ground that it only set out copies of the proceedings in the inferior court.

ON shewing cause against a rule for quashing a writ of certiorari and return, and for a procedendo, these facts appeared:—An attachment had issued from the court of pleas of Berwick, against the goods of the defendant; and bail was put in, and a plaint entered at the next court. A writ of certiorari was afterwards issued to the mayor of Berwick. A return was afterwards made to the writ, setting out copies of the attachment, bail-piece, and plaint—

Per Cur.—The bail had no power over his person. The return of the certiorari must be quashed, as a copy of the record, instead of the record itself, has been returned, and a procedendo must be issued.

See 1 B. & C. 512.

REX *v.* KENYON, E. T. 1827. K. B. 6 B. & C. 640; S. C. 9 D. & R. 694.

A return to a certiorari, not describing the justices as justices, or bearing their seals, was ordered to be amended.

IN a return to a writ of certiorari, to remove an order for stopping up a footway, the justices did not describe themselves as justices of the county, or affix their seals to it. On an application to amend this return—

Per Cur.—We think we ought not only to permit the justices to perfect the return, by putting their own proper descriptions and their seals to it, but that we ought to compel them to do so, because otherwise we should enable them, either wilfully or by negligence, to defeat the process of this Court.

VI. BAIL ON.

KEATE *v.* GOLDSTEIN and Another, M. T. 1827. K. B. 7 B. & C. 525; S. C. 1 M. & R. 305.

If a proceeding by foreign attachment in the mayor's court of London against several, is removed by certiorari, bail must be put in for all the defendants.

AN application was made for a procedendo to remit aailable action commenced in the mayor's court of London, and the proceedings by foreign attachment thereon, which had been removed by certiorari into this Court. Only one of the defendants put in bail—

Per Cur.—We must not allow a defendant, by his own act, and for the sake of the advantage he seeks to derive from it in removing the suit, to deprive the plaintiff of the advantage which he would have had, if the suit had remained in the court below. The principle of compelling one defendant, under circumstances like these, to put in bail for his co-defendant, is founded on reason and justice.

* The return of a certiorari must return the record itself, and not set it out according to its tenor. (*Askew v. Hayton*, 1 D. P. C. 510). Where one inhabitant of a parish has removed an indictment against it for the non-repair of a road into the King's Bench, and has given the usual security for costs, in case a verdict of guilty should pass, the other inhabitants of the parish will not be permitted to plead guilty to the indictment. (*Rex v. The Inhabitants of Luxborough*, Ib. 527).

At all events, we are bound, under such circumstances, to send the cause back to the original jurisdiction.

See 1 *Saund.* 67; 3 *Price*, 263; 2 *J. & Y.* 111; *Manning's Nisi Prius Digest*, 2nd ed. 350.

VII. AS TO QUASHING THE WRIT*.

VIII. PROCEEDINGS AFTER RETURN.

CLERK v. MAYOR OF BERWICK AND ANOTHER, M. T. 1825. K. B. 4 B. & C. 649; S. C. 7 D. & R. 104.

THE plaintiff's goods were distrained by the defendants for rent. The plaintiff replevied, and gave a bond in the usual form, conditioned to appear and prosecute his suit with effect in the court of pleas at Berwick. He afterwards filed his plaint, and the defendants removed it by certiorari, and notice of issuing the writ was served on the plaintiff. The latter was ruled to declare; but not having declared, the defendant signed judgment of non pros. A question then arose, whether the plaintiff was entitled to his costs of signing the judgment.

If the defendant removes a cause by certiorari, the plaintiff is not bound to follow the suit; consequently a non pros. cannot be signed for want of declaration.

Per Cur.—It appears that this non pros. was irregular; and consequently, the defendants are not entitled to their costs. The language of the writ of recordari is, that the sheriff have the record before the Justices at Westminster on such a day, “and prefix the same day to the parties, that they may be then there to proceed in that plea, as it shall be just.” The writ of certiorari contains no direction of that kind, but merely requires that the record and process shall be returned. Now, where a day is not given to the party, the Court cannot pronounce judgment against him for not appearing. The rule must therefore be discharged.

See 1 *T. R.* 371; 3 *Mau. & Sel.* 93; 4 *B. M.* 190; *Fitz. Nat. Brev.* 162; *Ib.* 548.

IX. COSTS ON†.

REX v. HIGGINS, M. T. 1836. K. B. 5 *Ad. & E.* 554; 1 *N. & P.* 50.

To an indictment for obstructing a highway the defendant pleaded, and traversed to the following sessions, but ultimately gave notice of trial for the next sessions but one—the Michaelmas sessions. The prosecutor was prepared with his witnesses and counsel at those

Where a certiorari has been obtained vexatiously, the Court will

* If a plaintiff, without improper motives, has removed a judgment into a superior court by an irregular writ of certiorari, issued without leave of the Court, such amendments will be allowed and such terms imposed as will enable him to avail himself of the judgment, without prejudice to the defendant. (*Rowell v. Breedon*, 3 D. P. C. 324). The Court will not quash a writ of certiorari, unless there is an admission, or something tantamount to it, by the party suing it out, that he has done so for the purpose of delay. (*Landens v. Sheil*, *Ib.* 90).

† Where an indictment on the 7 & 8 Geo. 4, c. 30, s. 16, is removed by certiorari into the King's Bench, and is tried on a record issuing out of that Court, the expenses of prosecution cannot be allowed under the 7 Geo. 4, c. 64, s. 22. (*Rex v. Kelsey*, 1 Dowl. P. C. 481).

quash it, but cannot award the consequent costs to which the opposite party has been put in the inferior court, whether the complaining party is prosecutor

sessions. At nearly the close of them the defendant produced a certiorari, which he had obtained in the month of March previous, without any intimation to the prosecutor, or countermand of the notice of trial. A rule was obtained by the prosecutor for quashing the certiorari, and obtaining the costs of the proceedings to which he had been put at the quarter sessions.

Per Cur.—We think the prosecutor is entitled to a rule for quashing the certiorari, and for a procedendo, because he shews that justice was not the object in suing out the certiorari: but as to the other point, we cannot find that we have any power here to award costs of proceedings in another court. *Stacey v. Evans*, (13 Price, 449), appears to have been decided as to this point, on the authority of *Jones v. Davies*, (1 B. & C. 143); and both decisions are overruled by *Rex v. Pasman*, (1 Ad. & E. 603). We cannot, therefore, grant the costs.

See Comb. 225; 8 *East*, 260; 1 *Ad. & E.* 475.

REX *v.* PASMAN AND OTHERS, T. T. 1834. K. B. 1 *Ad. & E.* 603; S. C. 3 N. & M. 730; 2 *D. P. C.* 529.

or defendant.

A BILL for a conspiracy by the defendants was found at the Middlesex sessions in November. The defendants gave to the prosecutor notice of trial for the 16th of January following; and the prosecutor, before the opening of the court on that day, lodged a certiorari with the clerk of the peace, whereby the proceedings were removed into this Court. An application was afterwards made for a rule requiring the prosecutor to pay the costs incurred by the defendants at quarter sessions, previous to the removal of the indictment.

Per Cur.—The certiorari issued regularly; and there is no reason, therefore, for making the prosecutor pay these costs, as he has proceeded with perfect regularity. We do not see how this Court can have any power over the costs incurred *before* the certiorari issues.

See 4 *Burr.* 2456; 1 *B. & C.* 143; 8 *East*, 269; 4 *C. & P.* 224.

REX *v.* THOMPSONS and Others, E. T. 1831. K. B. 2 *B. & Ad.* 287.

Rated inhabitants, who have been violently interrupted in their attendance at a vestry meeting by rioters, are parties *grieved* within the meaning of the 5 & 6 Will. & M. c. 11, s. 3, and therefore entitled to their costs.

IN this case the question was, whether the prosecutors of this indictment, which was for a riot, were parties “grieved” within the meaning of the 5 & 6 Will. & M. c. 11, s. 3. The prosecution was at the instance of persons claiming to be churchwardens of a parish. They summoned a meeting of the parish for the purpose of imposing a church-rate. The prosecutors attended not merely as churchwardens, but as rated inhabitants for the purpose of voting. A riot took place there, and the prosecutors were maltreated by the rioters.

Per Cur.—We think that, although the prosecutors were not properly civil officers, they were parties grieved within the meaning of the act of Parliament. It appears, that the parishioners being about to assemble peaceably in the vestry-room, for the purpose of imposing a church-rate, the defendants and others made the riot, and thereby impeded the business of the meeting; and that two of the prosecutors were violently pushed about by the rioters, who blocked up the entrance to the vestry-room, and thereby forcibly

hindered them and a third prosecutor from entering the vestry-room, which they had a right to enter as rated inhabitants, and so kept them excluded until two magistrates dispersed the rioters; that the other prosecutor, Hubback, having got into the vestry-room and voted, wished to return home, but was prevented by the rioters having surrounded the door of the room, and was, against his will, compelled to remain in the room until the dispersion of the rioters. We think that the parties who suffered under this annoyance and obstruction in going to and returning from the vestry, were parties grieved within the meaning of the act of Parliament.

See 1 *M. & Sel.* 268; 3 *M. & Sel.* 465.

REX v. RICHARDS, T. T. 1828. K. B. 8 B. & C. 420; S. C. 2 *M. & R.* 405.

IN this case an indictment for a riot was found at the quarter sessions of the county of Salop. It was afterwards removed by certiorari into this Court. The defendant was convicted. The question was, whether the prosecutor was entitled to his costs of prosecution under the 7 Geo. 4, c. 64, s. 23. The words of that section are—"That, where any prosecutor or other person shall appear before any court, on recognizance or subpoena, to prosecute or give evidence against any person indicted of any assault with intent to commit felony, of any attempt to commit felony, of any riot, &c., every such court is hereby authorized and empowered to order payment of the costs and expenses of the prosecutor and witnesses for the prosecution, together with a compensation for their trouble and loss of time, in the same manner as courts are hereinbefore authorized and empowered to order the same in cases of felony."

Where an indictment for a misdemeanour has been removed from the quarter sessions into this Court, the prosecutor is not entitled to his costs under 7 Geo. 4, c. 64, s. 23.

Per Cur.—This subject has been taken into consideration by the twelve Judges, and they are unanimously of opinion that a prosecutor, who removes an indictment by writ of certiorari from the court of quarter sessions into this Court, is not within the meaning of the statute.*

Cestui que Trust. See tit. *Trustee*.

Cestui que vie. See tit. *Life Estate for*.

Cestui que use. See tit. *Trustee*.

Challenge of Jurors. See tit. *Jury*.

* In *Rex v. Kelsey*, (1 D. P. C. 481), the Court decided that a similar rule applied to indictments for felonies when removed by certiorari.

Champerty.

STANLEY v. JONES, H. T. 1831. C. P. 7 Bing. 369; S. C. 5 M. & P. 193.

An agreement to give or furnish evidence, so as to enable the defendant to recover certain sums of which he had been defrauded, cannot be enforced.

THE plaintiff entered into an agreement with the defendant to furnish and to procure evidence to enable him (the defendant) to maintain an action against third persons, in consideration of the defendant's paying a clear eighth part of the sum recovered. It appeared that the defendant had been defrauded of the money to which the agreement referred.

Per Cur.—The offence of champerty is defined in the old books to be the unlawful maintenance of a suit in consideration of some bargain to have a part of the thing in dispute, or some profit out of it. That this offence was considered in earlier times, and in all countries, an offence pregnant with great mischief to the public, is evident from the provisions made by our law in the statutes of Westminster, the 1st and 2nd, and from the language of the civil law, which was afterwards received as the law over the greater part of the Continent. (Vide Dig. 48, 7—6). The object of the law was not so much to prevent the purchase or assignment of a matter then in litigation, as the purchase or assignment of a matter in litigation for the purpose of maintaining the action; as is evident from Lord Coke's reading on the statute of Westminster the 2nd, c. 49, (2 Inst. 584), where he remarks,—“True it is, that if any *other person* (*i. e.* than the Chancellor, Treasurer, and other persons mentioned in the act), purchase *bonâ fide* depending the suit, he is not in danger of champerty; but those persons here prohibited cannot purchase at all, neither for champerty nor otherwise, depending the plea,”—evidently pointing to the distinction, that the offence of champerty consisted in purchasing an interest in the thing in dispute, with the object of maintaining and taking part in the litigation; and we see no reason to doubt that the offence of champerty, in this restricted sense, remains the same as heretofore. Courts of equity have, in various modern cases brought before them, held the offence still to exist. In *Stevens v. Bagwell*, 15 Ves. 139, where a bill was filed for the purpose, amongst other things, of declaring an agreement void, which had been made by a seaman, for the sale of his chance of prize money to his prize agents, who were to carry on the suit, the Master of the Rolls, (Sir *William Grant*), said:—“I expressed at the hearing my opinion, that the agreement was void from the beginning, as answering to that species of maintenance which is called champerty, viz. the unlawful maintenance of a suit in consideration of a bargain for a part of the thing, or some profit out of it.” See also 18 Ves. 126; and the opinion of the Master of the Rolls, in 2 Jac. and Walk. 135. Now, in the present case, the plaintiff does purchase an interest in the subject-matter of dispute, not in terms indeed, but in substance and effect, as he bargains distinctly for a share of the sum to be recovered. He does not, indeed, stipulate that he is to furnish money for the carrying on the suit, or that he is to carry it on himself; but he stipulates that “he should and would use, and exert his utmost influence and means for procuring such evidence as should be requisite to substantiate the claims of the defendant.” And if there is any difference between this contract

and direct champerty, it appears to us to be strongly against the legality of this contract, which we are of opinion cannot be enforced.

WILLIAMS v. PROTHEROE, H. T. 1829. Ex. 3 Y. & J. 129; S. C. 5 Bing. 309.

WRIT of error on a declaration, stating articles of agreement between the vendor and purchaser of an estate, by which it was agreed the purchaser, bearing the expense of certain suits commenced by the vendor against an occupier for by-gone rent, should have the rent so to be recovered, and also any sum that could be recovered for dilapidations, and that the purchaser at his expense might use the name of the vendor in any action he might think fit to commence against the occupier for arrears of rent, or dilapidations.

Per Cur.—Champerty is, according to the definition of Lord Coke, a bargain with the demandant or tenant, plaintiff or defendant, to have part of the thing in suit if he prevail therein, for maintenance of this or that suit. In the same commentary Lord Coke takes a distinction between officers of the king and strangers. The purchase of a matter in suit, pendente placito, by a person in office, is champerty, but it is not champerty if the purchase be by a stranger. But here it is by a bonâ fide purchaser to recover rent due, and in respect of injuries committed previously to the purchase. That applies to the agreement respecting the by-gone rents, to which, it is said, without the agreement the vendor would be entitled. To say that the agreement respecting the dilapidations is champerty, would be carrying the law of maintenance and champerty further than it was ever carried in times when that law was necessary for the then state of society. In our opinion the agreement is legal.

But an agreement between vendor and vendee, that the latter shall sue in the former's name for by-gone rent, &c. is not champerty.

Chancellor, Lord. See tits. *Bankrupt*—*Judges*.

Chancery, Answer in. See tit. *Evidence*.

Chapter-House*.

Chapel. See tit. *Church and Chapel*.

Chaplain. See tit. *Church and Chapel, and Ecclesiastical Persons*.

Character. See tit. *Master and Servant*.

* A book produced from the chapter-house of the Dean, &c. of S., kept by the chapter-clerk, and purporting to contain copies of leases granted by the Dean, &c., held to be in the nature of a public document, and admissible in evidence. (*Coombs v. Wheeler*, T. T. 1829, N. P., 1 M. & Malk., 398).

Charity.

WALKER *v.* RICHARDSON, T. T. 1837. Ex. 2 M. & W. 882.

The 9 Geo. 2, c. 36*, does not invalidate a lease of charity lands already in mortmain†.

THE plaintiffs were the lessees, under the Bishop of Durham, of the port, haven, and creek of Stockton, by a lease granted to them in September, 1829; the defendant was the registered owner of the Majestic, steam-boat; and the question was, whether the landing-place at Middlesborough upon the Yorkshire side of the Tees, where the defendant had landed and taken in cargoes, was within the port of Stockton. The plaintiffs' evidence consisted of various leases, for twenty-one years, to the mayor and corporation of Stockton, from the year 1620 downwards, and including the lease of 1829, under which the plaintiffs claimed. In most of them the demise was, "of the port or creek of Stockton;" and in the 3rd of James II., the demise was of, "all that port, haven, and creek of Stockton." The lease under which the plaintiffs claimed the tolls was dated the 14th September, 1829, for twenty-one years, reserving a rent of 20s., and granted by the Bishop of Durham to the plaintiffs and two other persons, who were dead, in which, after a demise of the port and creek of Stockton, was the following clause:—"And it is agreed, that the premises are so demised upon trust, that the said lessees, their executors, administrators, and assigns shall, from time to time, apply and dispose of the profits to arise from the above-demised premises for the making and repairing the public streets and pavements within the said borough of Stockton, or for or towards the payment of the debts contracted on that or on any other occasion, or for other public uses within the said borough, and for the public advantage and convenience thereof, in such manner as the mayor, aldermen, and burgesses of Stockton aforesaid for the time being, from time to time to be assembled at the courts to be held for the said borough, or the major part of them, shall from time to time direct or approve." This lease had affixed to it the episcopal seal of the Bishop of Durham, was attested by one witness, and not inrolled in Chancery. It was objected, on the part of the defendant, that, as the profits were to be applied to charitable purposes, the lease was not properly attested and inrolled within the 9 Geo. 2, c. 36, s. 1. But *Patteson, J.*, admitted the lease, being of opinion that a lease of lands already in mortmain was not within the statute 9 Geo. 2, c. 36. On motion for a nonsuit—

The Court entertained the same opinion.

DOE *d.* PREECE *v.* HOWELLS, E. T. 1832. K. B. 2 B. & Ad. 744.

A deed for charitable purposes

A HUSBAND, being in custody for having deserted his wife and children, by deed, reciting that they had become chargeable, and

* Abridged, post, tit. *Mortmain*.

† A gift of personal residue to parties, with a request that they would intreat the lord of a manor to grant waste land for the erection of buildings for a charitable purpose:—Held, that, not excluding the purchase of land, or if it did, yet, being given as an inducement to draw land into mortmain, such gift was void. (*Mather v. Scott*, 2 Keene, (Chancery), 172).

that the present and former officers had expended £—— in maintaining them, conveyed to trustees for the parish officers of the time being certain lands, to the intent that the profits should be applied for their use and benefit, in aid of the relief of the poor; but the deed was not inrolled—

must be inrolled*.

The Court held, that the deed was on that account void, being within the words of 9 Geo. 2, c. 36, s. 1, as a conveyance in trust for the benefit of a charitable use; and that, to bring a case within the exception in sect. 2, the consideration must be paid by the person for whose benefit the conveyance is made:—Held, also, that a party to the deed was not estopped from saying that it was void in law.

DOE *d.* WILLIAMS *v.* LLOYD, M. T. 1839. C. P. 5 *Bing. N. S.* 741; S. C. 8 *Scott*, 93.

A DECEASED party had conveyed to the lessors of the plaintiff certain premises, which he inhabited until his death, by a deed of sale under the 9 Geo. 2, c. 36, (the Statute of Charitable Uses), and survived the transaction for more than a year; and shortly after the execution of the deed he had transferred to trustees a certain sum of money greater by a few pounds than that which he received on the sale, for the purpose of enabling them to build a chapel upon the premises which had been sold.

The Court held, that it was competent to the defendant, the heir-at-law, to give evidence to the jury that the transaction was fraudulent and collusive, for the purpose of evading the Statute of Charitable Uses, and that he was not estopped from so doing by the fraud of the ancestor through whom he claimed.

And a gift for a charitable purpose of land may be questioned by the heir of the donor, on the ground that it was a contrivance to evade the Statute of Mortmain.

ALLISON *v.* STARK, H. T. 1839. Q. B. 1 *P. & D.* 183.

A DEVISE of lands to trustees, the rents of which were to be applied, as to one moiety, to the relief of poor and needy people of good life and conversation, and as to the other, for putting out poor boys apprentices—

The Court held, that the devise did not constitute the lands parish lands, vesting in the overseers, &c., within 59 Geo. 3, c. 12, s. 17; and where lands are vested in trustees, the statute does not take them out and vest them in the parish officers. The Master of the Rolls having, in an amicable suit, decreed that the parish officers should pay the trustees of lands so devised a rent for a work-house built on the family estate, which had been acquiesced in and rent paid:—Held, that use and occupation might be maintained for the rent in arrear.

A devise of lands to trustees to apply the rents in relief of good needy people and to bind boys apprentices, does not make the land parish land within the 59 Geo. 3, c. 12.

* In *Doe d. Williams v. Lloyd*, (H. T. 1841, C. P., 1 *Scott*, N. S. 505), the following memorandum was indorsed on a deed which conveyed land to charitable uses:—"Inrolled in his Majesty's High Court of Chancery the 17th December, 1836, being first duly stamped according to the tenor of the statutes made for that purpose. D. Drew." It was proved that, shortly before the trial, Mr. Drew acknowledged the signature was his, and that he was, at the time he so acknowledged it, the clerk of the inrolments:—Held, that the memorandum must be considered as having been made by the proper officer, and was sufficient evidence of the inrolment of the deed under stat. 9 Geo. 2, c. 36.

WILKINSON *v.* MALIN, T. T. 1832. Ex. 2 C. & J. 636; S. C. 2 Tyrw. 544.

Charitable funds given for the relief of the poor in the reign of Hen. 6th, may be applied in building a school-house and appointing a master to teach the poor.

A TRUST fund was to be applied towards the repairs of the church of W., the payment of the fifteenths, and relief of the poor of W., buying of armour, and setting forth soldiers, and repairing Sawbridge-bridge, within the parish of W. The trustees erected a school-house and appointed a schoolmaster. In trespass, to try the question whether they had a power to do so or not, to a plea of liberum tene-mentum in certain persons, the plaintiff replied, soil and freehold in the same persons as trustees of a charitable fund, and in no other right whatsoever; and that the premises had been used by those persons and their predecessors, as such trustees, for a school-house and for the residence of the schoolmaster; and that the plaintiff was duly appointed schoolmaster of the said school-house by the then trustees of the said charitable fund.

The Court held, that building a school-house and educating poor children is within the meaning of such trust for the "relief of the poor;" and therefore an election of a schoolmaster, by a majority of the trustees assembled for that purpose, is valid.

ATTORNEY-GENERAL *v.* BRENTWOOD SCHOOL, M. T. 1831. K. B. 3 B. & Ad. 59.

The office of master of a grammar school is capable of alienation.

By letters patent, giving license to A. Browne to found a grammar school in Brentwood, to consist of a master and two guardians, it was granted to A. B. and Joan, his wife, and the heirs of the said A. B., that the said A. B., during his life, and the said Joan, his wife, during her life, (if she should survive), and after their decease, the heirs of the said A. B. and the heirs of the same heirs, should be the undoubted patrons; and that all and singular the masters of the said school should be named and nominated by the free disposition of the said A. B. during his life, and of the said Joan during her life; and after their decease, by the free disposition of the heirs of the said A. B., and the heirs of the same heirs.

The Court held, that the right of appointing the schoolmaster and wardens, given by these letters patent, was alienable.

BIGNOLD *v.* SPRINGFIELD, 1839, Dom. Proc. 5 Bing. N. S. 745; S. C. 8 Scott, 101.

After the 1st August, 1836, the powers of the administrators of charities, described in the 71st s. 5 & 6 Will. 4, c. 76*, ceased.

UPON appeal in Dom. Proc., and the opinion of the Judges taken—
Held, that the administration of charity estates and funds, comprised in and described by sect. 71 of 5 & 6 Will. 4, c. 76, did not continue, after the 1st August, 1836, in the persons described in that section, no subsequent act having passed respecting the same before that day, and no vacancy having been occasioned amongst such persons before that time; and that the Lord Chancellor had authority to make order for the appointment of new trustees.

* By which, after reciting, "And whereas divers bodies corporate now stand seised or possessed of sundry hereditaments and personal estate in trust in whole or in part for certain charitable trusts, and it is expedient that the administration

Charter.

See also tit. *Corporation*.

REX v. JARAM, M. T. 1825. K. B. 4 B. & C. 692; S. C. 7 D.
& R. 163.

A GENERAL power had been granted by charter to the lord of a liberty, to have the return of all processes within the liberty by his bailiffs, unless it touched his Majesty or the Crown; and it appeared that the bailiffs had regularly attended the sessions, and made return of jurors within the liberty.

The Court held that, upon construction of the charter and 27 Hen. 8, c. 24, s. 7, the duty of the bailiff was not confined to the execution of civil process, but that he was bound to summon the jurors and attend the justices; and that the court of quarter sessions might at their option proceed either against the sheriff or the bailiff.

A charter to the lord of a liberty, that he and his bailiffs shall have the return of process, except as to the Crown, enables them to act at the quarter sessions.

thereof be kept distinct from that of the public stock and borough fund; Be it enacted, that in every borough in which the body corporate, or any one or more of the members of such body corporate, in his or their corporate capacity, now stands or stand solely or together with any person or persons elected solely by such body corporate, or solely by any particular number, class, or description of members of such body corporate, seised or possessed for any estate or interest whatsoever of any hereditaments, or any sums of money, chattels, securities for money, or any other personal estate whatsoever in whole or in part in trust, or for the benefit of any charitable uses or trusts whatsoever, all the estate, right, interest, and title, and all the powers of such body corporate, or of such member or members of such body corporate, in respect of the said uses and trusts, shall continue in the persons who at the time of the passing of this act are such trustees as aforesaid, notwithstanding that they may have ceased to hold any office by virtue of which, before the passing of this act, they were such trustees, until the first day of August one thousand eight hundred and thirty-six, or until Parliament shall otherwise order, and shall immediately thereupon utterly cease and determine: Provided always, that if any vacancy shall be occasioned among the charitable trustees for any borough before the said first day of August, it shall be lawful for the Lord High Chancellor, or Lords Commissioners of the Great Seal for the time being, upon petition in a summary way, to appoint another trustee to supply such vacancy; and every person so appointed a trustee as last aforesaid shall be a trustee until the time at which the person in the room of whom he was chosen would regularly have ceased to be a trustee, and he shall then cease to be a trustee: Provided also, that if Parliament shall not otherwise direct, on or before the said first day of August, one thousand eight hundred and thirty-six, the Lord High Chancellor, or Lords Commissioners of the Great Seal, shall make such orders as he or they shall see fit for the administration, subject to such charitable uses or trusts as aforesaid of such trust estates."

Charter-Party*.*(See 5 Peters. Abr. 294).*

- I. AS TO THE CONSTRUCTION OF CHARTER-PARTIES,
p. 544.
- II. AS TO DEMURRAGE, 551.
- III. AS TO FREIGHT, 553.
- IV. AS TO THE PLEADINGS, 558.
- V. AS TO THE EVIDENCE, 559.

I. AS TO THE CONSTRUCTION OF CHARTER-PARTIES.

CROZIER *v.* SMITH, T. T. 1840. C. P. 1 *Scott, N. R.* 338; S. C. 1 *M. & Gr.* 407.

A charter-party
must be con-

ASSUMPSIT on a charter-party. By that instrument it was stipulated that the vessel was to sail from London with a cargo for

* The term charter-party is generally understood to be a corruption of the Latin words *charta partita*; see Hargrave's notes on the 1st Inst. 229. Pothier, (*traité de charte-partie*, Num. 1), gives the same etymology of this word from Boerins, but with a different explanation. It appears to have been so called from the ancient custom of first writing the contract upon a large skin of parchment, which was then divided into two parts, by being cut in an indented line from top to bottom, of which each of the contracting parties took one. As this indented line necessarily passed through some word or figure common to both parts, the exact tallying of the two parts upon relation and comparison was conclusive evidence of their original agreement and correspondence. With the same design, indentation was afterwards introduced; and deeds of more than one part thereby acquired among the English lawyers the name of indentures. This practice of division, however, has long been disused, and that of indentation has become a mere form.

A charter-party of affreightment may be defined to be an agreement in writing under seal or otherwise, between the owner or master of a ship and the hirer or the owner of goods, by which the owner or master of the ship agrees to let the same or the principal part thereof (though generally the whole ship) to the hirer or owner of goods for the conveyance of them to some destined place or places; such owner of goods paying freight.

A merchant who has purchased commodities, and who usually confines his capital and attention to whole sale trade, seldom has a ship of his own at command, to bring home the goods which he has purchased. He therefore resorts to some person who has employed his capital and attention peculiarly in the carrying trade. If the quantity of the commodities purchased be very considerable, or the merchant is desirous of making a speculative voyage to foreign parts to purchase various commodities in one or more parts, he then hires an entire ship; if, on the other hand, the commodity is not sufficient to occupy an entire ship, in general he merely contracts with the ship-owner to carry the particular commodity to the port of destination. In the first case, it is usual to enter into a formal contract for the hiring of the entire ship for some certain voyage, or for a limited period; and this contract is usually termed a charter-party, and the ship is termed a chartered ship. In the latter instance, where the entire ship is not hired, she is termed a general ship, because it is open and common to all such merchants as choose to load their goods on board; and it is not then usual for the master to sign any contract; but the captain of the vessel usually, in the course of foreign trade, signs an acknowledgment of having received the goods on board the ship, with a stipulation that the goods shall be safely carried; and which contract is called a bill of lading. However, it is by no means true that a charter-party always is, or necessarily must be, a contract for the whole ship,

Kingston, or any other port in Jamaica; and having discharged the same, receive on board a cargo from thence, or from a port on the Spanish Main, if required, and deliver the same at a port in the United Kingdom: freight to be paid, 250*l.* in ten days after sailing from Gravesend, and 750*l.* more in two months after a right delivery of the homeward cargo at her port of discharge in the United Kingdom, provided she should be required to proceed to one port only in Jamaica, and 25*l.* more, should she be required to go to two or more ports in that island; and in case the vessel should be ordered to the Spanish Main, 4*l.* per day was to be paid for every day after the twenty-fifth day after her arrival at Jamaica, until dispatched from her loading port: demurrage, 100*l.* per month, or in proportion for a less period, payable on settlement of the hire of the vessel. The vessel sailed from London, and discharged a portion of her outward cargo at Kingston, and the residue at another port in Jamaica, and sailed thence to a port on the Spanish Main, to receive a homeward cargo, and there remained 139 days beyond the stipulated 25 days. The question was, when the days of demurrage, at 4*l.* a day, were to be reckoned. On demurrer—

Per Cur.—Contracts of this nature are to be construed according to the intention of the parties, as it is to be collected from the language they have used. The cases that have been cited are all, as far as they go, in favour of the defendant: they tend to this, that generally freight is payable only on the arrival of the vessel at her port of discharge, unless there be an express provision to the contrary; as in the present case, so far as relates to the 250*l.* It is only on the safe arrival of the vessel that the merchant gets his goods; and therefore it is but just that the payment of freight should be contingent upon that event. The language of this charter-party appears to us to be perfectly clear and free from ambiguity. The vessel is to sail from London to Jamaica; freight to be paid, 250*l.* in ten days after sailing from Gravesend; 750*l.* more in two months after a right delivery of the homeward cargo at the port of discharge in the United Kingdom, if required to proceed to one port only in Jamaica; 775*l.*, if required to proceed to two or more ports there; and the 750*l.*, or the 775*l.*, plus 4*l.* per day, in case the vessel should be ordered to the Spanish Main; the whole to be paid on arrival at the ship's port of discharge in the United Kingdom. The stipulation for payment of the 250*l.* shews that, if the parties had intended to provide for the payment of any further portion of the freight at any particular time, they knew how to express themselves. The charter-party, however, points out no other day for payment of the 4*l.* per day than that provided for the payment of the 750*l.* or 775*l.*; viz. two months after the safe delivery of the homeward cargo. We think it would be a surprise upon both parties to tell them that they contemplated the payment of the 4*l.* day by day.

strued according to the intention of the parties; and the time at which the days of demurrage are to begin to be reckoned must depend on the construction of the whole instrument.

any more than that a bill of lading is only given where there are several articles or descriptions of merchandize shipped on different accounts. The former may be for the whole or part of the ship; and the latter may be where all the goods on board are of the same sort, and shipped on the same account, and the whole ship is occupied by them. Vide Abbott's Treatise on Shipping, ably edited by Serjeant Shee, p. 210; Mr. Holt's Treatise on Shipping, vol. 2, p. 1; Mr. Lawes's Treatise on Charter-parties, p. 1; Mr. Chitty's Treatise on Commercial Law, vol. 3, p. 387; and Pothier, Traité des Contrats de Louages Maritimes.

COCKBURN v. WRIGHT, H. T. 1840. C. P. 6 *Bing. N. C.* 223;
S. C. 8 *Scott*, 489; 8 *D. P. C.* 260.

Unless it is expressly stipulated in a charter-party, that the owners shall take an intermediate voyage between an outward and another port, the owners are not bound to take it.

ASSUMPSIT on a charter-party. It appeared that by that instrument it was agreed that the ship should receive on board a cargo in the London Docks, and proceed therewith to Bombay, and there discharge the same; and should then load a full cargo, with which she should proceed direct to London, in consideration of a certain gross freight. It was further stipulated by the charter-party, that the merchants should have the privilege of sending the ship to Calcutta from Bombay, paying at the rate of 17s. per registered ton per month for the extra time occupied, and also port-charges and pilotage at Calcutta; and that, if the ship returned from Bombay direct to London, the merchants should have the power of sending her to one port on the Malabar coast to receive cargo, paying as before for the extra time. The owners discharged the outward cargo at Bombay. The question was, whether they were bound to take in a cargo for delivery at Calcutta.

Per Cur.—The plaintiffs allege, as a breach of this charter-party, that the defendants refused to proceed from Bombay to Calcutta with a cargo. The charter-party contains no express stipulation that the vessel shall go to Calcutta either with or for a cargo; the plaintiffs, therefore, were bound to shew that by necessary intentment there was a promise to do that which they charge the defendants with having failed to do. No doubt, if we were at liberty to import into this record our own knowledge and experience, that Calcutta is an outward and not an inward port, and that the custom is to make the intermediate voyage suggested, the construction for which the plaintiffs contend would be correct. But we think we are not at liberty to do so. It is enough to say that this charter-party contains no contract on the part of the defendants to do that which the plaintiffs complain has not been done.

BALLEY v. DE ARROYAVE, H. T. 1838. Q. B. 7 *Ad. & E.* 919;
S. C. 3 *N. & P.* 114.

A vessel, within the meaning of a charter-party, may be said to have pratique as soon as she is allowed, by the laws of the country to which she sails, to unload.

ASSUMPSIT on a charter-party by the owner against the freighter, for detaining the vessel eleven days beyond the time limited by the charter-party. That instrument was in these terms, so far as was material for the purpose of the present record:—"Ninety running days are to be allowed the said merchant (the defendant), if the ship is not sooner dispatched, for unloading and loading the ship at Accra, Whidah, or any other ports or places on the coast of Africa, to commence on arrival at Accra or Whidah, whichever may be her first ordered port of repose, being in all respects ready to unload, and having received pratique, and so to continue whilst trading to or at any other ports or places on the coast (casualties excepted), and on her being finally loaded and dispatched; and ten days on demurrage over and above the said laying days, at 4*l.* 4*s.* per day." The declaration alleged that the vessel proceeded to Whidah, and there obtained pratique; and that afterwards she was wrongfully detained by the defendant. The defendant pleaded, "That the said vessel was not ready to unload her outward cargo aforesaid, and did not receive pratique for a long time after her arrival at

Whidah aforesaid; to wit, for a space of time equal to the time during which it is in the declaration alleged that the defendant wrongfully kept and detained the said vessel over and above the said running days and days of demurrage respectively." At the trial it appeared that there was no custom-house or health-establishment at Whidah, nor any means of obtaining pratique. On a question whether on this issue the verdict ought to be found for the plaintiff—

Per Cur.—The correct meaning of the word "pratique," contained in a charter-party like the present, with respect to a country like Africa, is that which has been given to it by the counsel for the plaintiff; and therefore we are of opinion that he is entitled to a verdict on that issue. We think "pratique" in this charter-party means the moment the vessel begins to unload her cargo at her outward port, and that, as soon as a vessel is allowed to unload by the laws or customs of the country, she may be said to have "pratique."

See *Falconer's Marine Dictionary*; *Plowd. Comm.* 101; 9 *Rep.* 65 a.; *Répertoire de Jurisprudence, par Merlin, tit. Quarantine.*

JACKSON *v.* GALLOWAY, M. T. 1838. C. P. 5 *Bing. N. C.* 71; S. C. 6 *Scott*, 786.

ASSUMPSIT on a charter-party. The plaintiff's vessel, which was lying at Pembroke, was chartered on a voyage from Cardiff to Alexandria with a cargo of coals and iron to be shipped at Cardiff; forty running days to be allowed the merchant for loading at Cardiff and unloading at Alexandria, to commence on the 16th December. At the request of the plaintiffs the defendant consented to the coals being put on board at Pembroke instead of at Cardiff. The question was, whether the running days were to be reckoned from the 16th December, notwithstanding the substitution of Pembroke for Cardiff.

Per Cur.—The parties having agreed to substitute Pembroke as the place at which the coals were to be put on board, instead of Cardiff, the contract between them was so far varied, but no further. There can be no reason why the lay-days should not be reckoned from the 16th December, as provided by the charter-party.

CAPPER *v.* FORSTER, T. T. 1837. C. P. 3 *Bing. N. S.* 938; S. C. 5 *Scott*, 129.

ASSUMPSIT for freight due on a charter-party. By the charter-party it was stipulated that the ship should proceed from London to Rio Nunez on the coast of Africa, and discharge there, and reload a full and complete cargo of enumerated articles, all or either at the option of the charterer at certain specified rates of freight; if the vessel should not be full at Rio Nunez, the charterer to be at liberty to fill it up at St. Mary's. The vessel returned with a full cargo, consisting principally of timber, but which was not one of the enumerated articles. The question was, what was the amount of freight to which the owner was entitled?

Per Cur.—As we understand the charter, it contemplates a voyage to Rio Nunez, at which place it was intended both by the ship owners and the merchant that the outward cargo should be discharged and the homeward cargo put on board; the homeward cargo being intended to consist of the enumerated articles, or of

If a particular day is agreed by a charter-party to be that from which the running days are to be reckoned, the substitution of one place of loading for another does not interfere with the date from which they are to be reckoned.

If a ship is chartered to bring home certain enumerated articles, the freight of which is to be at certain specified prices, but it brings home certain unspecified articles, the owner is entitled to freight as on a full cargo of the enumerated articles shipped in fair proportion.

some of them, with liberty however of filling up the vessel at St. Mary's, that is, of supplying at the latter place any deficiency of the contemplated cargo which they might be unable to procure at Rio Nunez. That Rio Nunez was her place of destination, appears manifest from the provision that she was to discharge her outward cargo at the factory of the merchant's agent there; and, having so discharged her outward cargo, was to reload a full and complete cargo of lawful merchandize which the merchant bound himself to ship. This is the direct obligation into which the merchant enters; the filling up at St. Mary's is only a liberty given to him in his own case, and for his relief in case he should be unable to comply with his direct obligation. And we think this provision in the charter points so specifically to Rio Nunez as the port of discharge and reloading of the homeward cargo, that we cannot give to the mention of "ports of loading on the coast of Africa," or "the liberty of filling up at St. Mary's," the force of altering or controlling the primary intention of the charter. And upon the construction we have already put upon the charter-party, we think the jury right in finding that the loading nearly a complete cargo of timber at St. Mary's, although it was the staple commodity of that place, was not a "filling up with lawful merchandize," according to the intention of the parties. The plaintiff is therefore entitled to the freight on a full cargo of the enumerated articles shipped in fair proportion.

See 2 Stark. 459; 4 M. & Scott, 575; 4 Campb. 103.

MITCHENSON *v.* BEGBIE, T. T. 1829. C. P. 6 *Bing.* 190; S. C. 3 *M. & P.* 442.

Where a ship-owner enters into a charter-party at a certain rate, and the charterer enters into a sub-charter-party at an increased rate, the owner can only recover from the consignee of the sub-charterer the amount of the rate stipulated in the original charter-party, although the consignee in ignorance of the difference of rate promised to pay the greater rate.

ASSUMPSIT for freight on a charter-party. The plaintiffs as ship-owners contracted by charter-party with one Gerlach, to take on board a cargo of wheat at Dantzic, where the latter resided, and convey it to London at 4s. 6d. per quarter. Gerlach not having a cargo ready entered into a sub-charter-party with Messrs. Saermans to take corn at 6s. per quarter. The latter consigned the cargo to the defendants under bills of lading, by which the corn was made deliverable to them or their assigns on paying freight at 6s. per quarter. No reference was made to the sub-charter-party in the bills of lading. Gerlach gave the defendants notice not to pay the full freight to the plaintiffs, stating that they were only entitled to freight at 4s. 6d. per quarter. The defendants refused to pay any more than the 4s. 6d. a quarter, although 6s. a quarter was demanded by the plaintiffs, and they at first promised to pay the greater amount. An action was brought and a verdict found for the amount at 6s. a quarter. On a motion to reduce the verdict to a sum calculated at the lower rate—

Per Cur.—It is quite clear from the evidence adduced at the trial, that the plaintiffs have obtained as much as they have bargained for, viz. the full amount of the freight stipulated to be paid to them according to the provisions of the charter-party; but they now seek to recover an extra sum for freight made payable under bills of lading, but which freight in fact belongs to Messrs. Saermans, the shippers, to whom Gerlach let the ship; and the charter-party entered into between those parties at Dantzic was sufficiently proved both in substance and in terms. If, however, the defendants were

liable for the extra or full freight, or could be compelled to pay it by any strict rule of law, we must be bound by it. All the cases to which we have been referred were cases where no *jus tertii* intervened. The parties who were entitled to the additional freight gave the defendants notice not to pay it to the plaintiffs. The question then is, whether in defiance of such notice they were bound to do so; the wheat being deliverable to them, by the bills of lading, on paying freight at 6s. per quarter, the freight payable by the plaintiffs' charter-party being 4s. 6d. only. Although the defendants at first promised to pay the full freight of 6s. per quarter, yet they did not then know the conflicting rights of the parties who were really entitled to receive it; and, therefore, such promise is not binding on them. If an agent receive money, with directions from his principal to pay it over to a third party, the principal may revoke the authority given to the agent at any time before the payment is actually made. Here the plaintiffs have received the whole of the benefit they expected to derive under the charter-party entered into by them with the agents for Gerlach. If a landlord let a house for 30*l.* per annum, and the tenant underlet it for 40*l.*, the landlord cannot claim the additional rent from his lessee. So, here, the plaintiff cannot be entitled to recover the additional freight of 1s. 6d. per quarter, according to the sub-charter-party entered into between Gerlach and Messrs. Saermans at Dantzic; and, as the defendants had notice not to pay such freight to the plaintiffs, we are of opinion that they were not entitled to recover it in this action.

See 13 *East*, 399; 2 *Show.* 443; 3 *Taunt.* 394; 6 *East*, 622, *n.*; 3 *Campb.* 548; 1 *East*, 507; 1 *Esp.* 24; 4 *Robins. Ad. M.* 236; 5 *Taunt.* 477; *S. C.* 1 *Marsh.* 146; 2 *M. & Sel.* 303; 5 *Taunt.* 612.

FENTON *v.* THE DUBLIN STEAM-PACKET COMPANY, *M. T.* 1838.
Q. B. 8 *Ad. & E.* 835; *S. C.* 1 *P. & D.* 103.

CASE for sinking the plaintiff's keel by the steam-boat of the defendants. At the trial, it appeared the steam-vessel which had caused the injury was under charter-party for six months, (the owners to keep it in order), for the conveyance of goods, &c., from Newcastle and Goole, or such other coasting station as the charterer might from time to time employ it in. The crew were appointed by the owners, but paid by the charterer, who was also to pay all disbursements. The charterer did not interfere with the navigation of the vessel; but while he was on board, through the negligence of the crew, it ran against and injured the plaintiff's keel. The plaintiff had a verdict; and on a motion for a new trial, on the ground that the action should properly have been brought against the charterer—

Per Cur.—The question is, not whether the charterer is liable, but whether the owners are. Although they have let the vessel, they derive a benefit from so doing, and have chosen to engage servants of their own for the ordinary navigation of it. We must take it that the accident happened in the course of ordinary navigation: the charterer might undoubtedly have made himself liable by any interference, but nothing of this sort appears, and we may, we

If a charterer pays the expenses of the vessel, but the crew of which are appointed by the owner, and the latter has the management of it, the latter is liable for an injury done to another vessel, although the former may be on board at the time.

think, hold that this action is properly brought against the owners, without impugning any previous authorities.

See 7 Taunt. 14; 7 Bing. 190; 1 Ad. & E. 312; Cowp. 143, 636; 3 Esp. 27; 2 N. R. 182; 5 B. & C. 546; S. C. 8 D. & R. 556; 2 M. & R. 1; 10 Bing. 345; 2 Stark. 438; 2 Str. 1251; 2 B. & B. 421.

SAUNDERS *v.* DREW, E. T. 1832. K. B. 3 B. & Ad. 445.

Where money is advanced, pursuant to a charter-party, for the hire of a vessel, and she is lost previous to the completion of the voyage, a proportional amount of the advance cannot be recovered from the owner.

ASSUMPSIT for money had and received. Plea, general issue. By a charter-party of affreightment for a voyage from the port of London to Calcutta and back on the usual terms, it was agreed that the freighter, if he thought proper, might hire the vessel for an intermediate voyage, within certain limits, for not less than six months; that, in that event, the master should refit the vessel for such voyage, and the complement of men should be kept up, and all necessaries provided: in consideration of which, the freighter agreed to pay the owner for such voyage at the rate of 1*l.* a ton per month on the ship's tonnage, and to pay four months of such hire in advance, and at the end of six months two further months' pay, and so on in every succeeding two months; and the balance due at the termination of such hiring, in cash or approved bills. It was further stipulated, that, if the vessel should be lost or captured, the freight by time should be payable up to the period when she should be so lost or captured, or last heard of. The ship made her voyage to Calcutta, and thence to the Isle of France, all the terms of the charter-party being duly fulfilled. When she was at the isle of France, the vessel was hired pursuant to the proviso for a voyage to Calcutta; and the master was paid 1734*l.*, four months' hire, in advance. She then sailed, and was lost two months after the contract for additional hiring. To recover a proportionate part of the money so advanced, the present action was brought. After argument on a special case—

Per Cur.—If the clause in question had stood alone, there could have been no doubt that the owner was entitled to retain the advance-money, according to 2 Shower, 288, confirmed by *De Silvale v. Kendall*, (4 Mau. & Sel. 37): and the subsequent stipulation for the payment of freight until the vessel should be lost or captured ought not to be considered as restrictive of the former clause, if the whole can be read together in a different sense. I think it may be so read. It cannot have been so intended, that, after the owner had been at the cost of refitting his vessel for the intermediate voyage, he should forego the advance made in consideration of that expense if the vessel were lost immediately on commencing such new voyage. The plaintiff was clearly not entitled to recover.

See 10 East, 555; 1 B. & Ald. 582.

ATKINSON *v.* COTESWORTH, H. T. 1825. K. B. 3 B. & C. 647; S. C. 5 D. & R. 552.

A commander of a ship, with whom a charter-party (not under seal) is

ASSUMPSIT on a charter-party, not under seal, by which it was agreed between the commander of a certain vessel and the defendant, that the vessel should take out a cargo to the Brazils, and the owner be paid a certain freight. Nothing was stated in the instrument as

to the person to whom the payment of the freight was to be made. The owners being dissatisfied with the master requested the defendants to pay another agent of theirs. This was accordingly done; and the present action was brought by the master to recover the amount of the freight, he having given notice to the defendant to pay no one but himself. The plaintiff was nonsuited. On motion for a new trial—

Per Cur.—The charter-party does not specify to whom the freight was to be paid. The case in that respect is, therefore, the same as if the freight had been stipulated for by a common bill of lading. The master of a ship has no prospective lien on the freight, and cannot insist on having it paid to himself; although a payment to him in the absence of any notice by the owner to the charterer to withhold it would be a good and valid payment.

See 1 B. & Ald. 575.

effected, and in which no provision is made as to who is to receive the freight, has no lien on it; and, therefore, a payment to another agent, at the instance of the owners, is good, even after notice from the commander to pay to him.

II. AS TO DEMURRAGE.

PRINGLE *v.* MOLLETT, H. T. 1840. Ex. 6 M. & W. 80.

ASSUMPSIT on a charter-party. The question was, whether the defendant, who was the charterer of a vessel to Odessa, was liable for the delay occasioned by the vessel being necessarily detained by its being frozen into the mole of the above foreign port.

Per Cur.—The detention by the ice was not occasioned by any fault of the defendant. In order to render him liable, the detention must have been for the purpose of loading.

See 3 M. & Sel. 267; 4 Campb. 333.

A charterer is not liable for the detention of a vessel in a foreign port by ice.

BRERETON *v.* CHAPMAN, T. T. 1831. C. P. 7 Bing. 559; S. C. 5 M. & P. 526.

ASSUMPSIT on a charter-party. The vessel was chartered from Hamburgh to Wells, or so near thereto as she could safely get, with fourteen lay-days for shipping and unloading cargo; demurrage to be paid at 5*l.* a day. Eight of the lay-days were exhausted at Hamburgh. The vessel arrived at the entrance of the port of Wells on the 16th November, 1830. The port is formed by an inlet of the sea, and the distance from the entrance to the quay, where vessels unload, is considerable. On the 17th the vessel was reported; on the 18th, 19th, and 20th, a portion of her cargo was removed into lighters, the vessel drawing too much water to proceed with her entire cargo. On Sunday the 22nd she might have gone up, but it appeared the crew were on shore. On the 27th the vessel arrived at the quay at Wells, and finished unloading her cargo on the 4th of December. By the custom of the port of Wells the lay-days for unloading do not commence running till the vessel arrives at the quay. A verdict was found for the plaintiff; and on a motion to enter a verdict on the ground that enough money had been paid into Court, or was due on a set-off, to cover the amount due for freight from the time that the vessel arrived at the quay—

Per Cur.—The only question is, when the lay-days began—viz. whether they are to be reckoned from the time of the arrival of the

The lay-days allowed by a charter-party for discharging a cargo are to be calculated from the time at which the vessel arrives at the usual place of discharge in the port of arrival.

vessel at the quay, being the place where it was usual to unload, or from the time when she arrived at the entrance of the port of Wells. We think that the lay-days ought to be computed from the time of the ship's arrival at the usual place of discharge, and not at the entrance of the port; for, if such days were to be calculated before the vessel arrived at the usual place of delivery, or where the unloading of the cargo commences, the inconvenience would be very great in several instances—viz. in the port of London, which extends to Yantlet creek, which is beyond the mouth of the Medway; so, the port of Hull extends from the town throughout the whole of the Humber, a distance of several miles—and here the jury have found that the lay-days for unloading do not begin to run until the vessel arrives at the quay at Wells, which is conformable to the custom of that port. In the cases to which we have been referred, the vessels had arrived at the usual places of discharge; as in *Leer v. Yates*, (3 Taunt. 87), where the ship had arrived at the London docks. We, therefore, think, that the mode of calculation adopted by the defendant in this case is correct—viz. that the lay-days for unloading must be calculated from the 27th of November, being the day on which the vessel arrived at the quay at Wells.

See 4 *Campb.* 327, 333; 3 *Taunt.* 387; *Holt, N. P. Cas.* 38; 5 *B. & C.* 406; 3 *Esp.* 121; 2 *Taunt.* 403, 405, *n.*

BENSON *v.* HIPPIUS, H. T. 1828. C. P. 4 *Bing.* 455; S. C. 1 *M. & P.* 246.

A consignee of goods having agreed, by letter, to place himself in the same situation as the charterer of a vessel, he is liable for demurrage due pursuant to the charter-party.

ASSUMPSIT on a charter-party. The charterer of a ship having consigned his cargo to Messrs. Pirie & Co., who placed it in defendant's hands to sell it, the defendant, by an agreement which stated those facts, undertook to pay plaintiff, the owner of the ship, freight and demurrage, if any were due, and in every respect to put himself in the place of the charterer. Fifty running days were allowed by the charter-party for loading and unloading, and ten for demurrage, at 10*l.* a day. The ship occupied ninety-five days in loading and unloading, several of which elapsed after the date of the defendant's agreement. The plaintiff had a verdict for 300*l.* as the demurrage for thirty days at 10*l.* a day; and on a motion for a new trial two questions were raised—first, whether sufficient consideration appeared on the face of the agreement; secondly, whether the defendant was entitled to recover in respect of the demurrage.

Per Cur.—This was an action brought by the plaintiff, as owner of the ship "Trusty," in which he sought to recover from the defendant a compensation in damages for a delay in unloading her cargo in the docks beyond the days of demurrage stipulated for by the charter-party. Two objections have been raised to the plaintiff's right to recover—first, that there is no consideration, apparent on the face of the contract, moving from the plaintiff to the defendant; and that *Wain v. Walters*, and several subsequent decisions, shew, that an action cannot be maintained unless the consideration for the defendant's promise, as well as the promise itself, be expressed in the contract or agreement, for the breach of which the defendant is sought to be charged. But we are of opinion, that a consideration sufficiently appears for the purpose of maintaining this action. The contract is loosely worded, and is in the shape of a letter from the defendant to the plaintiff, wherein he states that Messrs. Pirie & Co.,

the consignees of the plaintiff's ship's cargo, having placed it in his hands for sale, he engages to pay the plaintiff the freight and primage, and demurrage, if any were due. Considering the relative situations of the parties, this appears to us to be a sufficient consideration as between the plaintiff and defendant. The former was the owner of the ship, and Messrs. Pirie & Co. were the consignees of the cargo, and had placed it in the defendant's hands for sale; and therefore, if the plaintiff, as such owner, would deliver the cargo to the defendant, he undertook to pay the freight, primage, and demurrage, which the charterer was bound to pay. Secondly, it has been insisted that the plaintiff is not entitled to recover for the delay in unloading in the docks beyond the ten days' demurrage as stipulated or provided by the charter-party. But the defendant expressly undertook to put himself in every respect in the place of the charterer; he not only made himself liable to pay the freight, &c., due from Messrs. Pirie & Co., the consignees, but put himself in the place of the charterer, so far as respected the agreement for the voyage in question. Whatever, therefore, Gillam, the charterer, was bound to pay, the defendant agreed to be liable for; and there can be no doubt but that Gillam would be liable to the plaintiff, as well from the evidence adduced at the trial, as from the terms of the charter-party. If parties stipulate by such an instrument, that fifty running days are to be allowed for loading and unloading, and ten days on demurrage above those days, at 10*l.* per day, the charterer is liable for any detention beyond such days of demurrage: for, in point of fact, detention and demurrage amount to the same thing, as the latter is a compensation due to the ship-owner from the freighter by reason of any delay or detention of the ship beyond the time expressed in the charter-party; and, as the defendant agreed to put himself in the place of the charterer, he is liable to the plaintiff for the ship's detention at the docks until the cargo was finally discharged. It was admitted at the trial, that the delay in unloading the cargo was attributable to the crowded state of the docks, and not to any act or fault of the master. As, therefore, the vessel was prevented from being unloaded within the lay-days and days of demurrage allowed by the charter-party, the charterer was liable for the detention of the ship beyond that period; and if she were to be detained at the expense of the charterer, on the one hand, as the defendant had agreed to place himself in his situation, he is equally liable on the other.

III. AS TO FREIGHT.

MITCHELL v. DARTHEZ AND ANOTHER, H. T. 1836. C. P.
2 Bing. N. C. 555; S. C. 2 Scott, 771.

ASSUMPSIT for freight. On a special case, subject to which a verdict was found in favour of the plaintiff, these facts appeared. The plaintiff entered into a charter-party with the defendant, by which it was agreed that the plaintiff's ship, *Jane*, should receive on board a cargo, and proceed therewith to Buenos Ayres, and there deliver the same, and reload a cargo, and proceed therewith to a port between Gibraltar and Antwerp: freight for the voyage out and home

Although a charterer is not liable for freight *pro ratâ itineris*, in respect of an unperformed voyage, for which a

certain entire sum is to be paid, he is so liable if he has accepted the services of the ship to convey certain goods on his account during a part of the voyage contemplated by the charter-party.

1300*l.* in full, if delivered at Gibraltar, a port in Spain, London, or Liverpool, and 5*l.* per cent. additional, if delivered at a port in France, or at Antwerp: the freight to be paid—200*l.* in cash on the vessel being dispatched from Portsmouth; cash for the necessary expenses of the vessel in the river Plata, to be advanced there; and the remainder in cash on the final delivery of the homeward cargo. The vessel proceeded to Buenos Ayres, and there took on board a quantity of hides, under a bill of lading, by which they were to be delivered at Gibraltar to E. & Co., they paying freight at 4*l.* 10*s.* per ton. The 200*l.* were paid on the vessel leaving Portsmouth; and 66*l.* 3*s.* 11*d.* were advanced by the freighters to the master at Buenos Ayres. The *Jane* sailed for Gibraltar, and put into Fayal in distress. The cargo was there landed, and the ship condemned as unseaworthy, and sold. About one-third of the hides, being damaged, was there also sold. The master sailed to England with the proceeds of the hides sold, leaving instructions with the British vice-consul to forward the remainder to Gibraltar by the earliest opportunity. After the departure of the master, the vice-consul entered into a charter-party, on behalf of the owners of the hides, for their conveyance to Gibraltar by the *Flora*, for a freight of 360*l.*, with 5*l.* per cent. primage. The hides shipped on board the *Flora* under this charter-party were duly delivered to E. & Co. at Gibraltar; and they paid the freight and primage according to the bill of lading. The question was, what amount of freight the plaintiff, the owner, was entitled to under these circumstances.

Per Cur.—It appears to us that the goods which were left by the master of the *Jane* at Fayal, having been forwarded to Gibraltar by the vice-consul, acting in the name and on behalf of the owners of the cargo, and at their expense, cannot be said to have been carried to their destination by the owner of the *Jane* in fulfilment of the charter-party entered into with the defendants; and consequently, that the freight stipulated to be paid by the charter-party has not been earned. The next question is, whether any thing in the nature of freight is recoverable by the plaintiff upon a new and implied contract, founded on meritorious service rendered to the defendants by the plaintiff, in the partial performance of the voyage contemplated, and the acceptance of the goods by them under the circumstances stated in the case. The freight for the entire voyage was a gross sum of 1300*l.*; of which 200*l.* was to be paid in England in cash; part for the necessary expenses of the vessel in the river Plata; and the residue at Gibraltar, at the current exchange upon London. If the vessel had arrived at Buenos Ayres, and had been lost immediately afterwards, we think that nothing beyond the 200*l.* ought to have been claimed; but as she actually brought from Buenos Ayres to Fayal, on her way to Gibraltar, a considerable portion of the cargo put on board at Buenos Ayres, which portion has come to the hands of the freighters and been accepted by them, the question arises, whether the ship-owner has not a claim to freight, *pro ratâ*, for the conveyance of that portion of the goods from Buenos Ayres to Fayal: and upon the best consideration which we can give to the case, we think he has such a claim. We have already said that the goods were forwarded by the vice-consul, acting as the agent of the freighters; but the vice-consul was desired by the master of the *Jane* to forward them, though not on behalf of the ship-owner. The agents of the freighters at Gibraltar

have accepted the goods, paid the freight, and thereby recognised the act of the vice-consul as their agent. The case, therefore, must stand in the same position as if the freighters had accepted the goods of the master of the *Jane* at Fayal, and conveyed them on their own account to Gibraltar; in which case we think that they would be liable to pay freight for that portion of the voyage performed in respect of the goods accepted.

See 1 *C., M. & R.* 316; 1 *H. Bl.* 273, *n.*; 6 *T. R.* 573; 1 *Wms'.* *Saunders*, 323 *b. n.* 1; 10 *East*, 295, 394; 12 *East*, 381; 2 *Burr.* 882; 1 *W. Bl.* 190; 2 *Atk.* 621; 1 *Brownl.* 21; 8 *East*, 437; 7 *T. R.* 381; 2 *Camp.* 466.

CAMPION v. COLVIN AND OTHERS, T. T. 1836. 3 *Bing. N. C.* 17; S. C. 3 *Scott*, 338.

On a feigned issue directed by the Court of Chancery, it appeared that the plaintiff, owner of the ship *Hero*, entered into a charter-party with one J. B. Gooch, in London, for a voyage from London to Calcutta and back, covenanting to take in a cargo in London, and proceed therewith to Calcutta, receive on board a homeward cargo, and deliver the same according to bills of lading. The ship to take her regular turn in the East India Docks, for the purpose of delivering her cargo; the freighter to pay a certain sum for every passenger; and all the cabins, except one for the use of the captain, to be at the disposal and for the benefit of the freighter, who was to appoint a supercargo, not only to act as supercargo, but to take upon him the authority of the captain in the stowage of the cargo, which was to be done under his entire direction; but he was not in any other particular to interfere with the duties of the captain. And the freighter, J. B. Gooch, covenanted to load the ship, and to pay for the freight or hire of the ship for the voyage, at the rate of 14*l.* per ton registered tonnage, with primage, to be paid as follows: 500*l.* in cash at the expiration of six months from the date of the charter-party; a moiety of the remainder by bills at two months after date from the day of the ship's arrival in the Thames, on her return voyage; and the residue by bills at four months' date from the same period. The defendants, and Colvin & Co., of Calcutta, to whom the outward cargo was consigned, were cognisant of this charter-party. The ship sailed with a captain and crew appointed and paid by the owner. Arrived at Calcutta, Colvin & Co., as agents of J. B. Gooch, received the cargo, and put up the ship as a general ship; but not being able to fill her, they purchased and shipped on account of J. B. Gooch (but in their own name) 511 bales of cotton wool, which by the bill of lading were made deliverable to the defendants, and the freight for which was in the bill of lading expressed to have been paid by bills on London. It was found, as a fact, that the cotton wools in question were the property of J. B. Gooch. The question was, whether the plaintiff, as owner of the ship *Hero*, was entitled to a lien on the cotton wool for freight due under the charter-party beyond that which was due for the carriage of the wool upon the said voyage.

Per Cur.—This is the same charter-party on which the Court of King's Bench decided in *Saville v. Campion*, (2 B. & Al. 503); and the fact that the goods in question were consigned to third parties

The owner of a ship has a lien for his general freight under a charter-party on all goods placed on board by the charterer, although they may have been consigned by bills of lading to third persons.

does not take the case out of the principle of that decision. It is expressly provided that the delivery of the bills for the payment of the hire of the ship shall precede the delivery of the goods; for the bills are to be delivered when the ship arrives in the Thames, and the goods are not to be delivered till she has entered the proper dock. We ought not, therefore, to depart from the decision in *Saville v. Campion*.

See 2 *B. & Al.* 503; 2 *Marsh*, 339; 2 *B. & B.* 410; 4 *B. & Ald.* 630; 7 *Bing.* 190; 1 *B. Moore*, 373; 3 *Mau. & S.* 216; 2 *Mer.* 401; 8 *Taunt.* 280, 293; 1 *Ld. Raym.* 271; 6 *Bligh, Ap. Cas.* 190.

STANFORTH *v.* LYALL, M. T. 1830. C. P. 7 *Bing.* 169; S. C. 4 *M. & P.* 829.

Where the charterer of a vessel covenanted to pay a certain sum for dead freight, if he did not supply a homeward cargo, and no cargo was supplied, and the vessel made a more profitable homeward voyage than she would under the charter-party, it was held that the owner was only entitled to nominal damages.

COVENANT on a charter-party. The plaintiff chartered a ship to the defendants. The charter-party contained a stipulation that the ship should proceed to New Zealand, and that, when arrived, the master should give notice of the fact to the defendant's agent there, and wait fourteen days for a return cargo; but that, if the agent of the defendants should give notice of his determination not to load the ship with a return cargo at New Zealand, the voyage should be at an end, and the defendants should pay a dead freight of 500*l.* The ship accordingly proceeded to New Zealand; and the master, after waiting the necessary time, and finding no agent of the defendants there, went round to Batavia, and there obtained for the ship a much more valuable freight than she would have earned under the charter-party, after taking into consideration the increased expenses, and the delay of the circuitous voyage. An action was brought by the owner to recover from the freighters the 500*l.* dead freight. The cause was referred; and the arbitrator, taking into account the larger freight earned by the ship on the homeward voyage, directed the verdict to be entered for one shilling damages for the general breach of contract. On a motion to set aside the award, on the ground that the arbitrator should not have taken into account the earnings of the vessel on the homeward voyage—

Per Cur.—There is a general stipulation for a return cargo. The event in which the plaintiff was to be entitled to the 500*l.* has never happened; it therefore seems to us that we are to put the same construction upon this charter-party as if it had contained no such stipulation. The question then is, whether this is not the simple case of an action for general damages for the breach of the charter-party, in not providing the vessel with a return cargo. The arbitrator has taken into consideration the profit earned by the vessel on her homeward voyage; and finding that homeward voyage to have been more profitable to the owner than would have been the strict voyage contemplated by the charter-party, he has given the plaintiff nominal damages only for the breach of the contract. It has been argued, on the part of the plaintiff, that he was at all events entitled to the 500*l.* agreed to be paid on the default of the defendant's agent to provide a cargo at New Zealand. But, if the master of the vessel, on finding that no cargo was provided for him, had returned home in ballast, the maximum the plaintiff could have claimed would have been the 500*l.* penalty. The homeward voyage

has, however, placed him in a better situation. He could not be entitled to the penalty, and also to the profits of the homeward voyage. Therefore, as the event which would have rendered the contract a close contract never happened, we are of opinion that it has become a general contract, on breach of which the plaintiff would be entitled to all the damages he had sustained by such breach. Upon the whole, we think that one shilling was the proper measure of damages, and consequently, that the award of the arbitrator must stand.

GIBBENS *v.* BUISSON, M. T. 1834. C. P. 1 *Bing. N. S.* 283; S. C. 1 *Scott*, 133.

ASSUMPSIT on a charter-party for demurrage. Plaintiffs agreed with defendants to convey a cargo to Oporto; and if the river was in possession of an enemy, to unload at Foz, outside the harbour, and the freight was to be 475*l.*; or, if the vessel could enter Oporto, discharge and reload there, 300*l.* only. Twenty-five days were allowed for unloading. Plaintiffs arrived at Foz, June 2nd; and an enemy being in possession of the river, commenced unloading there. The vessel was detained at Foz, partly for the convenience of defendants, and partly by bad weather, till August 25th, and by that time had discharged seven-eighths of her cargo. The enemy then having quitted the river, she entered Oporto, where she discharged the remaining eighth of her cargo. In July the defendant's agent, Dourado, at Oporto, gave plaintiffs a bill for the larger freight. In September the vessel obtained, at Oporto, a full cargo for England. These facts having been agreed on in a special case, pursuant to the 3 & 4 Will. 4, c. 42, s. 25—

Where two different rates of freight are provided by a charter-party, lower or higher, as the vessel can discharge within or without the port, and the major part of the cargo is discharged without the port, the higher amount of freight is to be paid.

Per Cur.—The charter-party does not contemplate, or in any way provide for, the case of the discharge of the cargo commencing at one place and concluding at another: it evidently contemplates that the discharge once commencing, the whole cargo should be unloaded at the same spot. We merely use these observations as tending to shew that the fair inference to be drawn from the whole of the stipulations contained in the instrument is, that unless, at the moment of the ship's arrival off the bar of Oporto, she could safely enter the harbour, and should there unload the whole of her cargo, the larger freight was to attach. This construction, it is said, might give rise to a difficult and somewhat absurd consequence; for that it might have happened that a very minute portion of the cargo was delivered outside the harbour, and all the rest within. The case finds that seven-eighths of the cargo were discharged into boats whilst the vessel was at anchor off the castle of the Foz; but it is contended that the freight did not become payable until the delivery of the remaining eighth of the cargo. Independently, however, of the observations arising upon the charter-party itself, it seems to us that, inasmuch as the defendant's agent, Dourado, had thought proper to pay the larger freight before the vessel was discharged, he must be taken to have consented that the delivery of the cargo should be considered as having been virtually completed where she first took her station. And when we consider the correspondence that took place between Dourado and the master, it is evident that the detention of the vessel on demurrage beyond the laying days arose from the voluntary act of the former. It would

be too much to say that it was to be in the power of the defendant's agent to delay the vessel, and after the expiration of the lay-days bring her into port, and so make the smaller freight payable. Upon the whole we are of opinion, upon the construction of the charter-party, and upon consideration of the facts and circumstances stated in the case, that the plaintiffs were entitled to the larger freight of 475*l.*, and also to demurrage after the rate mentioned in the charter-party, for sixty-two days.

RIPLEY *v.* SCAIFE, H. T. 1826. K. B. 5 B. & C. 167; S. C. 7 D. & R. 818.

If the charterer of a vessel contracts to pay certain freight while a vessel is employed by him, he is liable to pay at the same rate for the period which during the voyage she is detained for the purpose of repair.

MONEY had and received. A charter-party contained the terms that the vessel should be employed for six months certain, at 200*l.* a month, and at the same rate for any further period that the vessel should be employed, the owners keeping her in repair. In the course of the voyage, effecting necessary repairs caused a detention of thirty-eight days. On the return of the vessel, the owners refused to deliver the cargo, unless they received payment of the agreed freight during the period of the detention for repairs. The amount demanded was accordingly paid, and this action brought to recover the amount of freight paid for the period occupied in repairs. The jury for the defendant.

Per Cur.—The charter-party renders the charterers liable for so long a time as the ship was employed. We think that the ship was in their employment while those repairs were going on, and that they were liable to pay freight during that period.

See 10 East, 555.

IV. AS TO THE PLEADINGS.

GOULD *v.* OLIVER, M. T. 1840. C. P. 2 Scott, N. S. 241, 636.

An assignment of a breach of a charter-party, treating a clause as obligatory against the owner, which, by the terms of the instrument, is an exemption in his favour, is bad, even in arrest of judgment.

ASSUMPSIT on a charter-party. By the charter-party it was stipulated, that the ship should proceed to Quebec, and there load from the factors of the plaintiffs a full and complete cargo of pine timber and deals, &c., *not exceeding what she could reasonably stow and carry over and above her tackle, &c.* The declaration assigned for breach, that the defendant did not nor would load in and on board the ship a full and complete cargo, *not exceeding what she could reasonably stow and carry over and above her tackle, &c.*; but, on the contrary, loaded on board the ship a cargo much exceeding that the said vessel could reasonably stow and carry over and above her tackle, &c. On motion in arrest of judgment—

Per Cur.—We are of opinion that this objection ought to prevail. So much of the clause in the charter-party as states that the ship shall load from the factors of the plaintiffs a full and complete cargo, is an agreement binding on the ship-owner, and compelling the defendant to take a full and complete cargo on board, if procured by the factors of the freighters, and ready for delivery on board at the proper time. But the condition thereto annexed, that it shall not “exceed what the ship can conveniently stow and carry,” is a condition introduced solely and exclusively in favour of the defendant, the ship-owner, in order to limit and define the extent of the general term “a full and complete cargo.” The plaintiffs could not

bring an action against the defendant for not loading a full and complete cargo, if the latter could shew that no more of the ship was left empty than was sufficient to stow her tackle, apparel, provisions, and furniture: but, on the other hand, the clause does not contain any words obligatory on the defendant, that the ship-owner shall not load more than the covenant compelled, if the freighters required it, and the ship-owner assented to it. The captain and the crew might, by putting themselves to personal inconvenience, be able safely to load on board a larger cargo than the ship-owner could be compelled to take; and such loading on board, if unattended with danger to the voyage, or injury to the plaintiffs, could not be considered as a ground of action upon the breach of a condition introduced entirely for the ship-owner's security. In short, the words are words of *exemption* in favour of the defendant, and the plaintiffs desire them to be construed as words of *obligation* against the defendant. The breach, therefore, we consider to be bad, and, as the damages are entire, the judgment must be arrested.

See 5 Taunt. 228; 5 C. & P. 98, 247; 2 M. & W. 642; 4 Camp. 142; 3 M. & W. 71; Skin. 54; 6 C. & P. 44; Valin. tit. Du Capitaine, art. 12; Consol. del Mare, c. 183; 2 B. & Ald. 421.

V. AS TO THE EVIDENCE*.

HOVILL v. STEPHENSON, E. T. 1829. C. P. 5 Bing. 493; S. C. 3 M. & P. 146.

COVENANT on a charter-party. After the execution of the charter-party, the plaintiff communicated an interest in the adventure to the attesting witness. It was objected, that the witness was incompetent to prove the execution of the instrument. The objection was allowed; and the witness refusing to release his interest, it was then proposed to prove his handwriting; and that evidence being objected to, the evidence was rejected, and the plaintiff nonsuited. On a motion to set aside this nonsuit—

Where, after the execution of a charter-party, the plaintiff communicated an interest in the adventure to the attesting witness, and he refused to re-

* The defendants having cross-examined the plaintiff's witnesses in order to shew a custom in the Canada trade to carry deck-cargo:—Held, that it was competent to the plaintiffs, in order to rebut the inference sought to be raised from that course of examination, to inquire whether, when deck-cargo was lost or thrown overboard, it was not usual for the ship-owner to pay for it. The defendants had paid money into Court upon a second count claiming general average in respect of the deck-cargo, which the plaintiffs took out of Court in satisfaction of the damages in that Court: these circumstances were offered on the part of the defendants as evidence of an admission by the plaintiffs that the deck-cargo was properly loaded:—Held, not admissible evidence. The Judge, in his summing up, told the jury, that *prima facie* the deck was not the proper place for the stowage of the cargo, or any part of it; that in some cases custom might sanction the practice; but that, without reference to any custom, if it increased the perils of the navigation, if it increased the danger of the ship, or increased the danger of that part of the cargo, in either case it was an improper stowage:—Held, that this direction was correct, in the absence of any evidence of a general custom to load deck-cargo at the risk of the shipper. One of the plaintiffs resided at Quebec: the timber was loaded at a place about three miles distant from Quebec, where it was furnished by one Jameson, the superintendent or agent of the plaintiffs:—Held, that the knowledge and assent of the resident plaintiff to a portion of the cargo being stowed on deck were not to be inferred from the fact of Jameson having such knowledge, and offering no objection to that mode of stowage. (*Gould v. Oliver*, M. T. 1840, 2 Scott, N. S. 241, 636).

lease that interest, he was held incompetent to prove the execution of the charter-party.

Per Cur.—There are several cases where a subscribing witness has acquired an interest after the execution of an instrument attested by him, in which it has been decided, that proof of his handwriting may be received to establish such instrument; for instance, the handwriting of a subscribing witness who has been appointed an executor or administrator, or has married the person to whom the instrument was given, has been allowed to be proved. We do not dispute the authority of any of those decisions; on the contrary, we should be disposed to extend the principle established by them to the case of a man entering into partnership, and becoming interested in instruments, by acquiring a share in the credits, and taking upon himself the responsibilities of the firm of which he becomes a member. Necessity requires that, in all these cases, such evidence should be otherwise received; as, if not, parties might lose the rights secured by the instruments attested, or forego the accepting of situations which might be most important to their welfare. It would be a great hardship, if the law were to say, that a man should not become an executor or administrator, or accept a beneficial partnership, without giving up his right to debts due to the estates in which he has acquired an interest. But, in the present case, the witness had only obtained an interest in the contract arising under the instrument which he was called on to prove, and that interest he derived immediately from the plaintiffs themselves, who proposed to call him. They, therefore, cannot complain that their witness is disqualified, when they have been the cause of his disqualification. That the interest was considered by the witness to be so valuable as to be likely to affect his testimony, is evident by the circumstance that he refused to release it. It would be improper to allow a plaintiff to give such an interest to a person in the particular transaction in which he is obliged to call him as a witness as is likely to bias his testimony.

BROWN *v.* THORNTON, H. T. 1837. K. B. 6 *Ad. & E.* 185;
S. C. 1 *N. & P.* 339.

A notarial copy of a charter-party, entered and signed by the parties in a notary's book abroad, is not of itself evidence of the charter-party in this country.

ASSUMPSIT on a charter-party. At the trial, it appeared that the defendant, in answer to a bill filed in Chancery, had admitted that he had ordered the cargo to be delivered at Antwerp, that it had been delivered accordingly, and that he was in possession of the bill of lading under which the goods were shipped, and of a copy of the alleged charter-party. Certain letters were produced, written by or to the defendant, referring to the chartering of the ship, and the shipping of the goods; but no letter from the defendant stated the rate of freight. On the bill of lading being called for, it was produced by the defendant; and it stated, that the goods were shipped by Robert Thornton, to be delivered unto Richard Thornton, Esq., (the defendant), or to his assigns, "he or they paying freight as per charter-party." To prove the charter-party, (which the defendant had notice to produce), the plaintiff put in a copy, not signed by the parties, under the notarial seal and signature of a person who was proved to be a notary at Batavia, and also under the signature of the acting Governor of Java. It was proved, that, under the Code Civil, which, as constituting a part of the Dutch law, (see Code Civil, livr. 3, tit. 3, ch. 6, and especially s. 1, § 4), prevails in Batavia, the notary is a public officer; and that contracts of

charter-party are entered into at Batavia by the contract being entered in the notary's book, and there signed by the parties; that the notary makes out two copies, which he signs and seals, and which are afterwards signed by the chief officer of the government, (the signature of the notary having been proved before him), and that one of these copies is delivered to each of the parties; that the copy now produced was such a copy, and that the seal and both signatures were genuine; that, in the courts of Java, in order to prove the contract, the notary's book is produced, but that, in Dutch courts out of Java, the copies so authenticated are received, and full faith given to them as evidence of the original, which is not allowed to be taken out of the island. The defendant's counsel contended, that the copy was not evidence; but the Judge admitted it, giving leave to move for a nonsuit. Verdict for the plaintiff. On a motion to enter a nonsuit—

Per Cur.—It appears to us, that the plaintiff cannot maintain this action without giving some legitimate evidence of the charter-party. That, therefore, makes the question before the Court merely one of evidence, which must be decided according to the laws of this country, although it may relate to a transaction in a foreign country. It is only necessary to see, then, whether the general rule with regard to the production of a document by the law of this country has been complied with. In the first place, it was contended that this document given in evidence was not a copy, but the original binding contract. We think, upon looking at the facts as they appear, that certainly is not the case. It seems the parties go before a notary public, who makes an entry in his book, which they sign, and that he either then, or at some subsequent time, either in the presence or not in the presence of the parties, makes and gives out to one or the other copies of the entries in his book. The document given in evidence in this case is one of those copies; under what circumstances made, whether or not in the presence of the parties, we do not know. It is quite clear on this statement, that the original contract between the parties is that which they have signed in the book of the notary public. Then, the original is not produced, and it cannot be produced. It is not denied on the other side, that secondary evidence might have been given of this instrument. Has secondary evidence been given of it? Certainly not secondary evidence in the strict and regular sense—viz. by the production of a copy examined with the original. But the copy is sought to be made out as good secondary evidence in one of two ways: either that it is a copy issued by a public officer, assimilating it to the case of a copy issued by the officer of a court employed for that purpose—certainly it cannot be made out to be such a copy on the facts of this case; and secondly, that it is a copy made by a person authorized between the parties to deliver a copy to each, which should guide them respectively. We do not think, when what took place is examined, that it amounts to more than that the parties went to the notary at Java, took a copy in the ordinary course from him, and that that copy would have been received with the same degree of faith as the original itself at Antwerp, or any other place where the Dutch law prevails; but that does not supersede the law of evidence in this country.

Chattels*.

Cheat. See tits. *Embezzlement—False Pretences—Frauds and Cheats.*

Cheque.(5 *Peters. Abr.* 393.)See tits. *Banker—Bills and Notes.*

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I. RELATIVE TO THE FORM OF†.

* All goods movable and immovable, except such as are in nature of freehold, or parcel of it, are *chattels*.

Chattels personal are things movable, which may be annexed to or attendant on the person of the owner, and carried about with him; such as money, jewels, coin, garments, and every thing else that can properly be put in motion and transferred from place to place.

Chattels real are defined to be things concerning or savouring of the realty; as terms for years of land, the next presentation to a church, estates by statute merchant, statute staple, or elegit, being interests issuing out of or annexed to real estates.

† A cheque or draft is an order for the payment of money uniformly payable on demand, and usually to bearer: it must be in writing, but no precise form or set of words is essential to its validity.

II. RELATIVE TO THE STAMP*.

III. RELATIVE TO THE CAPACITY OF THE CONTRACTING PARTIES†.

IV. RELATIVE TO THE CONSIDERATION.

DOWN *v.* HALLING, T. T. 1825. K. B. 4 *B. & C.* 330; S. C. 6 *D. & R.* 455; S. C. 2 *C. & P.* 11.

A. was proved to be the owner of a cheque drawn on a banker, payable to bearer. Five days after its date it was tendered in payment of goods to B., a tradesman, who gave his customer cash in change for it, after deducting the price of his goods. B. presented it the next day, and received the amount. It did not appear how the cheque passed out of A.'s possession.

The Court held—first, that, in an action by A. against B. for money had and received by him to the use of A., the jury were rightly directed to find for the plaintiff, if they thought the defendant had taken the cheque under circumstances which ought to have excited his suspicion; secondly, that the defendant having taken the cheque five days after it was due, the plaintiff had done enough by proving that he once had a property in it, without shewing how he lost it.

A party taking an overdue cheque takes it subject to the disabilities attached to the person from whom he received it.

ROTHSCHILD *v.* CORNEY, E. T. 1829. K. B. 9 *B. & C.* 388.

THE plaintiff was agent for paying the dividends on the Prussian loan contracted in 1818. The securities given by the Prussian Government were bonds, to which a number of dividend warrants, called coupons, were annexed. As the dividends from time to time become due, the holder of bonds delivers the coupons then due, together with a list, and his own name and address, to the plaintiff. The coupons and lists are then compared, and, if they be correct, the coupons are cancelled, and a cheque drawn by the plaintiff for the amount. The plaintiff was also agent for a Prussian company, called the Sechandling Company, who, in January, transmitted to him coupons to the amount of 15,371*l.*, to be received by him on their account. These coupons were compared with the list by one Burne, a clerk of the plaintiff, who then drew a cheque for the amount, which was signed by the plaintiff, and sent to his bankers, who placed it to the credit of the Sechandling Company's account, and debited the plaintiff's private account with it. Burne, instead of destroying all the coupons, fraudulently preserved a part, amount-

Where cheques are taken overdue, it is for the jury to say, whether the party has used due caution.

* The 55 Geo. 3, c. 184, exempts from stamp-duties all drafts or orders for the payment of money to the bearer on demand, and drawn upon any banker, or person acting as a banker, residing or transacting the business of a banker within ten miles of the place where such draft or order shall be issued, provided such place shall be specified in such draft or order, and the same shall bear date on or before the day on which the same shall be issued, and provided the same do not direct the payment to be made by bills or promissory notes.

† All persons having legal capacity to contract, in general, may draw, and are liable to be sued on a cheque or draft.

ing to 1,330*l.*, and procured two lists to be made out, one in names which for any thing that appeared were fictitious, amounting to 792*l.* 5*s.*; the other in other names to which the same observation is applicable, amounting to 534*l.* 15*s.* Burne then pretended to compare those lists with the coupons fraudulently preserved by him, and, on the 19th of January, drew two cheques for the amount, which, apparently in the ordinary course, were offered for signature to, and were signed by the plaintiff; and the words "and Co." were written across, to indicate that they must be presented to Masterman & Co., through some banking-house. On the 24th of January, one Blayney, a wine-merchant and broker, carried these cheques to the defendants, who were wine-merchants, and told them that payment could only be obtained by a banker; and that, as he did not keep an account at any banker's, he wished them to give him payment for the cheques, and to get them presented by their bankers, Remington & Co. One of the defendants, who knew Blayney personally, but was not acquainted with his residence, consented to do so, feeling confident that cheques drawn by the plaintiff would be paid. He accordingly gave Blayney money for the cheques, and handed them to Remington & Co., who, on the same day, presented them and obtained payment from Masterman & Co. Blayney received the cheques from his son, and at his request procured cash for them, with which the son afterwards absconded. Evidence was offered to shew the respectable character borne by the defendants. Upon these facts it was admitted, that the defendants had acted *bonâ fide*; but it was contended by the plaintiff that they acted without due caution in taking the cheques; and that, as they were six days old when handed to them, they must be considered as overdue; and, therefore, that the defendants could have no better title than Blayney, from whom they were received.

Lord *Tenterden* left it to the jury to find for the plaintiff, if they thought that the circumstances of the case were such as ought to have excited the suspicion of prudent men, and that the defendants, under the circumstances, had not acted with reasonable caution; but otherwise to find for the defendants. The jury found for the defendants; and the Court refused a new trial.

V. RELATIVE TO THE TRANSFER*.

VI. RELATIVE TO THE PRESENTMENT FOR PAYMENT.

MOULE *v.* BROWN, H. T. 1838. C. P. 4 *Bing. N. S.* 266; S. C. 5 *Scott*, 694.

A cheque must be forwarded the day after it is received for presentment.

THE plaintiff cashed a cheque upon the Bath bank, at Malmesbury, upon the 28th March, and did not transmit it until the evening of the 30th; and it was presented for payment on the 31st, when it was dishonoured and sent back to the plaintiff, who received it upon the 1st of April.

* Cheques are transferable by delivery, so as to vest the legal right to receive the money in the holder; and if taken in the course of business from a stranger, the amount may be recovered in an action against the drawer, unless fraud can be proved. (1 D. & R. N. P. 50; 4 B. & C. 330).

Per Cur.—The cases cited from 2 Camp. 527, and 4 Barn. & Adol. 752, are decisive of this; they shew that the party is allowed only until the next day to transmit the cheque, unless he has not the ordinary means of sending it by post. Now, the town where the cheque was cashed was a post-town; consequently, nothing appeared on the trial which could take the case out of the ordinary rule, which requires a cheque to be transmitted by the ordinary mode of conveyance, upon the day after receipt.

BODDINGTON v. SCHLENCKER, E. T. 1833. K. B. 1 N. & M. 540.

In an action upon a cheque, it appeared that the cheque had been drawn on Saturday, 26th March, and given by the defendant to the plaintiffs, for the amount of 830*l.* due to the plaintiffs for a quantity of sugar sold by them to the defendant. The defendant upon that occasion wrote the name of the plaintiff's bankers (Martin, Stone & Co.) on the cheque. The plaintiff having received the cheque about two o'clock in the afternoon, sent it the same day to Martin, Stone & Co. at about seven minutes before four o'clock; but before it could be entered the clerk of Martin, Stone & Co. had gone to the clearing-house, and it appeared that ninety cheques had arrived that day, which they had not time to send to the clearing house. The cheque was, however, sent to Bond, Patteshall & Co., at five o'clock, to know whether it would be paid on Monday; and the initials of the clerk were put on it to denote that it would. On the Monday, the cheque was sent to Messrs. Bond, Patteshall & Co., who had stopped payment. It appeared that they had money enough of the defendant's in their hands on Saturday to pay the cheque. It was proved that the practice of bankers within the city of London was to pay all their cheques upon each other at the clearing house by changing them, and giving over the balance on the same day on which the cheques came; provided they were sent so long before four as to be in time to make the proper entry before they carry them to the clearing-house; and where the cheques arrived after four o'clock, or near that time, it is the practice to send them to the bankers upon whom they are drawn, to know whether they will be paid; and the banker, or his clerk, puts his initials upon them, to denote that they will. It was contended, on the part of the defendant, that Martin, Stone & Co., ought to have presented this cheque for payment, by sending it to the clearing-house on Saturday, according to the usage and practice of bankers within the city; that they had been guilty of laches in not doing so, and that the defendant, therefore, was discharged. To which proposition, provided the jury thought they were guilty of laches, *Tenterden, C. J.*, assented, and the jury found a verdict for the defendant. On motion for a new trial—

Per Cur.—It is a general rule that a party, in whose favour a cheque is drawn, has until the close of banking hours on the following day to present the cheque. It seems to us that when this cheque was crossed it need not have been presented by the plaintiff until Monday. We cannot see upon what ground that, because he gave it to his banker, it ought to have been presented on the same day. Rule absolute.

If the banker resides at the same place, it should be presented the next day; and if crossed, the banker has the same time to present it in as the creditor has.

VII. REMEDIES ON—BY ACTION.

(a) FORM OF ACTION*.

(b) PLEAS.

FIELD *v.* WOODS, M. T. 1837. Q. B. 6 *D. P. C.* 23; S. C. 2 *N.* & *P.* 117; S. C. 7 *A.* & *E.* 114; S. C. 8 *C.* & *P.* 52.

Under the plea that defendant did not make the cheque, he may shew it was post-dated.

ASSUMPSIT on a banker's cheque drawn by the defendant, and dated the 12th June, 1835. The defendant pleaded that he did not make the cheque in manner and form as alleged in the declaration. On the part of the defendant it was contended that the cheque had been post-dated, and consequently required a stamp. In answer, it was objected that this defence was not available under the present plea. The point was reserved by *Williams, J.*, and the jury found a verdict for the plaintiff.

Per Cur.—Here is an instrument which on the face of it is good, but which on the evidence produced requires a stamp. In *Dawson v. McDonald* (2 M. & W. 26), the defendant, who was sued as acceptor of a bill of exchange, wished to plead that the bill was improperly stamped; and *Parke, B.*, said, "The only consequence of the wrong stamping is, that the instrument cannot be given in evidence. Allowing such pleas as this only raises doubts at the bar where none really exist. There is nothing in the new rules to require it. The defence is not in confession and avoidance, admitting that it was a good contract, but says that it is altogether void in law.

MILLS *v.* ODDY, E. T. 1835. Ex. 3 *D. P. C.* 722.

So, a plea of no consideration, fraud being shewn, is good after verdict†.

PLEA in assumpsit on a banker's cheque, no consideration for making it. Replication, that at the time of making it there was a good consideration. It appeared that it had been given at an auction, one of the conditions of sale requiring a deposit by the defendant, a purchaser of property, which the judge was of opinion had been fraudulently misdescribed by the plaintiff.

The Court held, that although the plea would have been bad on special demurrer, it was sufficient after verdict; and the transaction being rendered by the fraud null and void *ab initio*, the plea was proved, and the defendant entitled to the verdict.

HUMPHREYS *v.* WALDEGRAVE, T. T. 1840. Ex. 8 *D. P. C.* 768; S. C. 6 *M.* & *W.* 622.

A plea of gaming to an action on a cheque is not an issuable plea.

THE defendant being under terms of pleading issuably, pleaded to an action on a banker's draft, that the sole cause of his making the draft was for money won by one H. B. in a common gaming-house from the defendant, by gaming.

Per Cur.—An issuable plea is a plea in chief to the merits. The present plea contains no merits, for it is consistent with all the facts

* An action of special assumpsit is the appropriate form of action on a cheque; but debt may be sustained by payee against the maker.

† But the Judge (*Parke, B.*) gave leave to find the facts specially, with a view to an application to the Court, under 3 & 4 Will. 4, c. 42, s. 24. (*Mills v. Oddy*, N. P., 1835, 6 C. & P. 728).

stated in it, that the plaintiff may have a good right to recover in the action. The rule for setting aside the judgment must be discharged.

JENKINS *v.* CREECH, M. T. 1836. Ex. 5 *D. P. C.* 293.—S. P. M'DOWALL *v.* LYSTER, M. T. 1836. Ex. 2 *M. & W.* 52.

APPLICATION for leave to add a plea to the record. The action was brought on a banker's cheque, and the defendant had pleaded but one plea; viz. that the cheque was given for a gambling debt. He was now desirous of also pleading that the cheque was drawn more than fifteen miles from the place where the banker resided, and consequently it would not be exempted from stamp-duty by the 9 Geo. 4, c. 49, s. 15.

Per Cur.—We cannot now allow you to add this plea. Any plea which denied the drawing of the cheque would have raised this objection as to the stamp. Rule refused.

To an action on a cheque, after gaming pleaded, the Court refused to allow a plea to be added, that it was drawn more than fifteen miles from where the bankers resided*.

(c) REPLICATION†.

(d) EVIDENCE.

FIELD *v.* WOODS, M. T. 1837. Q. B. 6 *D. P. C.* 23; S. C. 2 *N. & P.* 117; S. C. 8 *C. & P.* 52.

ASSUMPSIT on a cheque. The cheque was read; and the defence was, that it was post-dated. It was contended that, as the cheque had been read, it was too late to take an objection to the want of a stamp; and to this suggestion *Williams, J.*, assented. But

The Court said, the 31 Geo. 3, c. 25 enacts, that no bill of exchange shall be given in evidence unless it is duly stamped. It appears, in point of fact, that the instrument was read. Certainly, the late practice at Nisi Prius has been, that if once a document is read it has not been allowed to be struck out of the Judge's notes. But there is a difference between those cases where the defect appears at once, as on a bill of exchange, or a deed having more than the right number of words, and this, where the defect is not at once visible. Here the objection could not be raised till the defect was pointed out by intrinsic evidence, or, if raised, could only have been *de bene esse*; and therefore we think the objection need not have been made on the first production of the instrument.

The objection, that a cheque was post-dated may be taken after it is read.

PEARCE *v.* DAVIS, T. T. 1834. N. P. 1 *M. & Rob.* 365.

THE only evidence that the plaintiff could produce in support of the demand for money lent was a cheque drawn by the plaintiff on his banker in favour of the defendant; and there was no evidence to shew that this cheque had ever been presented for payment.

A cheque, without shewing it to have been presented and paid, is not evi-

* In assumpsit on a cheque by the holder against the drawer, pleas: 1st, that it was given to a third party for losses at gaming, and notice to the plaintiff before he received the cheque; and 2nd, that the plaintiff gave no value for it; and issues on the notice and value given:—Held, that the plaintiff was entitled to begin. (*Bingham v. Stanley*, 1840, N. P. 9 *C. & P.* 374).

† *De injuriâ* is a good replication on general demurrer to a plea in an action on a cheque, that it was given for a gambling debt. (*Curtis v. Headfort, Marquis of*, E. T. 1838, Q. B., 6 *Dowl. P. C.* 496).

dence of money lent*.

Patteson, J.—The production of this cheque is not evidence of any loan; if it be evidence of any thing, it is rather evidence of payment. It operates as payment until it has been presented and refused.

An unstamped cheque is evidence to prove a fraud.

KEABLE v. PAYNE, T. T. 1838. Q. B. 3 N. & P. 531; S. C. 8 A. & E. 551.

A. PURCHASED some cattle at a fair, and gave in payment an unstamped cheque on a banker who lived more than fifteen miles from the place where it was dated, but with whom he had no effects. He afterwards sold them to B. In an action by the original owner of the cattle against B. for their value, on the ground that they had been fraudulently obtained by A.—

The Court held that the unstamped cheque was receivable in evidence to prove the fraud.

Where the defence is gaming, the cheque need not be produced without notice.

REED v. GAMBLE, M. T. 1835. K. B. 5 N. & M. 433.

ASSUMPSIT against the drawer of a cheque on a banker. Plea, that the amount for which the cheque was drawn was illegally won at play, and issue thereon. The plaintiff did not produce the cheque. No notice to produce had been given. The jury found a verdict for the plaintiff. On motion for a nonsuit—

Per Lord Denman, C. J.—The defendant was entitled to give notice for the production of the cheque, for the purpose of going into secondary evidence; but it was not necessary for the plaintiff to produce it. The non-production of the cheque did not prevent the defendant from going into his defence. Rule refused.

(e) RULE TO COMPUTE.

BENTHAM v. CHESTERFIELD, LORD, E. T. 1838. C. P. 5 Scott, 417.

A rule to compute allowed in an action on a cheque.

IN an action on a banker's cheque, a rule was obtained to compute principal and interest on the cheque, and the Court made the rule absolute.

VIII. RELATIVE TO THE RIGHTS AND LIABILITIES OF THE BANKER†.

* Where notice was given to produce a cheque:—Held, that the plaintiff was entitled to give parol evidence of its contents, although it had not been shewn to have been delivered to defendant from the banker, the latter being the agent of the customer. (*Partridge v. Coates, M. T. 1824, N. P., 1 Ry. & M. 156; S. C. 1 C. & P. 534*).

† Where the payee and drawer of a cheque kept accounts with the defendants (bankers at S.), and the former paid in a cheque directing it to be paid to his account or credit, but in the course of the day it was discovered that the defendants had no funds to meet it, and they therefore returned it to the plaintiff on the following day:—Held to be sufficient notice of the dishonour, and that they had not, by receiving the cheque, made it their own, but had only received it as the agents of the plaintiff. (*Boyd v. Emmerson, M. T. 1834, K. B., 4 N. & M. 99. Abridg. ante, vol. i. p. 578*).

The assignees of a bankrupt may recover from a banker money paid by them in obedience to the bankrupt's draft after an act of bankruptcy. (*Vernon, assignee of Tyler, v. Hanson, E. T. 1788, K. B., 2 T. R. 287*). And if a banker pay a cancelled cheque under circumstances which ought to have excited his suspicion, he does it in his own wrong. (*Scholey v. Ramsbottom and Others, T. T. 1810, N. P. 2 Camp. 485*).

IX. RELATIVE TO THE GIVING A CHEQUE WHERE THE PARTY HAS NO ACCOUNT*.

Chemical Discoveries. See tit. *Patent*.

Chester. See tit. *Palatine, Counties of*.

Chief Justice and Chief Baron. See tits. *Judges—Warrant*.

Chief Rents. See tit. *Rent*.

Children. See tits. *Bastard—Births—Distribution—Kidnaping—Parent and Child*.

Chimney-Sweepers†. See ante, tit. *Apprentice*.

Chose in Action‡. See tits. *Bills and Notes—Bond—Insolvent Debtor—Composition with Creditors—Covenant*.

C. draws a cheque on his bankers, payable to A. and B., assignees of C., or bearer, and writes the name of their banker across it; B., who has another private account with the banker, pays the cheque into that account:—Held, that the bankers are justified in applying it to that account; the drawer's writing the name of the bankers of the payees of the cheque across it not being, according to the custom of trade, information to the bankers that the money is that of the payees.

Semble, the custom of writing the name of a banker across a cheque is only for the purpose of securing that the payment shall be made to some banker, not to the banker originally named; for the holder may substitute another for him, and this even when the name of the particular banker is originally written not by himself, but by the drawer. (*Stewart v. Lee*, H. T. 1828, N. P., M. & M. 158).

* A person, by giving a draft on a banker with whom he keeps no account, was holden not to be guilty of an indictable offence. (*Rex v. Lara*, Dec. Sess. 1794, Old Bailey, 2 Leach, C. L. 647; S. C. 6 T. R. 565). But it has been since settled that a cheque is a false pretence within 30 Geo. 2, c. 24, if given by a person who knows it will not be paid. (*Rex v. Jackson*, Spring Ass. 1813, 2 Leach, C. L. 656, note; S. C. 3 Campb. 370).

† The 4 Will. 4, c. 35, regulates the apprenticing and treatment of chimney-sweepers; and the 3 & 4 Vict. c. 85, regulates the employment.

‡ Though a chose in action cannot be assigned at law, (*Tatlock v. Harris*, E. T. 1789, K. B. 3 T. R. 182), it may in equity; and the courts of law will permit the assignee to sue in the assignor's name, (*Delany v. Stoddart*, M. T. 1785, K. B., 1 T. R. 26; S. P. *Johnson v. Collings*, M. T. 1800, K. B., 1 East, 103); and it may be assigned by parol as well as by deed. (*Howell v. M'Ivers*, E. T. 1792, K. B., 4 T. R. 690; S. P. *Heath v. Hall*, E. T. 1812, C. P., 4 Taunt. 326).

Where a chose in action has been assigned, the assignee cannot file a bill against the debtor, unless the creditor is interfering to prevent the matter being tried at law, and a demurrer allowed. (*Hammond v. Messenger*, 9 Sim (Ch.) 327).

Christmas Day. See tit. *Bills and Notes*.

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I. AS TO CHURCHES.

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I. AS TO CHURCHES.

(a) RELATIVE TO THE BUILDING CHURCHES*.

(b) RELATIVE TO THE KEY OF THE CHURCH†.

(c) RELATIVE TO THE PEWS. See also, post, tit. *Pew*.

HARRIS v. DREWE, E. T. 1831. K. B. 2 B. & Ad. 164.

THIS was an action on the case. The declaration stated, that the plaintiff was possessed of a messuage, with the appurtenances, situate in the parish of Keynsham, in the county of Somerset, and therein inhabited and dwelt with his family; and by reason thereof had, and still of right ought to have, for himself and family inhabiting the said messuage, the use and benefit of a certain pew in the parish church of Keynsham aforesaid, to sit, stand, or kneel in, to hear and perform divine service; yet the defendants, without the leave and license of the plaintiff, pulled down and prostrated a part of the pew, and inclosed and separated a part from the residue thereof, and kept and continued the same so inclosed. The defendant pleaded not guilty. It appeared, in 1765, a faculty was granted by the bishop of Bath and Wells, reciting "that John Emery was possessed of a messuage or dwelling-house in Keynsham, formerly called the Old Lamb and Lark public house, and that he had no seat to which he had a legal title, and had applied to have a pew in the church appropriated to him in respect of such messuage or dwelling-house, to be used by him and his family for ever, and the successive owners and occupiers of the same." The pew was then granted to John Emery and his family for ever, and the owners and occupiers of the said messuage, exclusive of all other persons. Emery, and several persons who had occupied the dwelling-house under him, had from time to time used the pew, which was one capable of holding nearly thirty persons. The plaintiff having purchased the premises of Emery's daughter, had let the old dwelling-house to one Taylor, who occupied it at the time when the defendants, who were churchwardens, committed the act complained of by dividing the pew into two. Taylor had paid rent to the plaintiff for the old dwelling-house. The plaintiff himself lived in a house adjoining that formerly occupied by Emery. It had at one time been a summer-house, and afterwards a stable attached to the old house, but was converted by Mrs. Emery, after the death of her husband, into a shop, in which she carried on business. Just before the plaintiff came to live there, a room over the kitchen, and which was part of the old dwelling-house, was laid into this building; and in the new dwelling-house, thus composed, the plaintiff lived at the time when the act complained of was done. For the defendants it was objected, that, as the plaintiff did not inhabit and dwell with his family in the ancient messuage in respect of which the pew was granted, he was not entitled to recover; but *Taunton, J.*, thought, that, as the plaintiff occupied part of the old house which had been

The churchwardens have no right to divide a pew granted by a faculty to a tenement, though there be several occupiers.

* Regulated by the 9 Geo. 4, c. 42.

† The minister has, in the first instance, the right to the key of the church and the churchwardens have only the custody under him. (*Lee v. Mathews*, 3 Hagg., (Arches), 169).

laid into the new one, the right of the pew, like a right of common of pasture, might be apportioned; and that the plaintiff, having some right which had been invaded by the defendants, was entitled to recover; and he directed a verdict to be found for the plaintiff.

Per Cur.—The faculty gave a right to the several persons who should be occupiers of the messuage to use the pew. If those persons should become too numerous to use the pew conveniently, and should disagree, a different question might arise; until then, the churchwardens had no right to interfere.

(d) RELATIVE TO THE BELL-ROPES*.

(e) RELATIVE TO THE VAULTS AND TOMBSTONES.

BRYAN *v.* WHISTLER, E. T. 1828. K. B. 8 B. & C. 288; S. C. 2 M. & Ry. 318.

A vault cannot be granted by parol, so as to bind the grantor or the rector; and it seems the rector has no power to make the grant at all.

THIS was an action on the case. The first count stated that the defendant was rector of the rectory and parish church of St. Clement, Hastings; that the plaintiff, being desirous to bury one Mary Ann Williams in a vault in the said church, heretofore &c., applied to the said defendant, as such rector, for permission to make a vault in the church of St. Clement, Hastings, as aforesaid, for the purpose of burying the dead body of the said Mary Ann Williams therein, and to put up a tablet or monument near to the said vault to perpetuate the same; and the defendant, as such rector, in consideration of 20*l.* to be paid to him for such permission, consented and agreed that the plaintiff should have permission to make such vault, and to put up such tablet or monument; and should have the sole and exclusive use of such vault upon being paid 20*l.*, and one guinea for the service. That the plaintiff made the vault, put up the tablet, and paid the defendant 20*l.*, and a guinea for the service; yet the defendant contriving, &c., and to deprive the plaintiff of the exclusive use and benefit of the said vault, and right of interment therein, and to disturb the remains of the said Mary Ann Williams; to wit, on &c., at &c., wrongfully and injuriously broke into, dug into, pulled up, forced up, took up, and damaged the said vault, and caused and procured the same to be broken into, &c., and caused to be interred in the said vault the dead body of another person; by means of which premises the plaintiff was deprived of the benefit and advantage of the said vault and monument, or tablet, and was disturbed and injured in the said exclusive right of interment in the said vault. The following were copies of the receipt given by the defendant when he received the consideration money, and of the tablet erected over the vault by the plaintiff:—

“Received the 18th of September, 1819, of Thomas Bryan, Esq., 20*l.*, for permission to make a vault in the church of St. Clement, Hastings, between the south wall and aisle thereon, and to put up a tablet or monument to perpetuate the same, &c., &c., &c., and one guinea for the service.

21*l.* 1*s.*

“WEBSTER WHISTLER,
Rector of Hastings.”

* The property of the bell-ropes in a parish church is in the churchwardens. (*Jackson v. Adams*, 2 Bing. N. S. 402; S. C. 2 Scott, 599; Abridg. post, tit. *Slander*).

“In a vault beneath this tablet, appropriated to the family of Thomas Bryan, Esq., are the remains of Mary Ann Williams, formerly of Mitcham, but late of this parish, spinster, who died the 11th of September, 1819, aged thirty-nine years.”

On behalf of the defendant two points were made: 1st, that the interest claimed by the plaintiff in the church in respect of his vault was a freehold interest, and could not be created by parol, or even by the receipt, which was not stamped, either as a deed or as an agreement; 2ndly, that if such an interest, so as to continue even during the incumbency of the defendant, the action should have been trespass, and not case.

Per Cur.—We do not think that this was an interest in the land. We think it was an easement only. But in that case, it could not pass except by deed, supposing the rector to have authority to make the grant; but we think he had no authority to grant it at all.

TROWER *v.* CHADWICK, M. T. 1836. C. P. 3 *Bing. N. S.* 334; S. C. 3 *Scott*, 699.

IN an action on the case, a count alleged that the plaintiffs were possessed of a vault or cellar adjoining other vaults and walls, and which in part rested upon and was of right supported in part by part of those adjoining vaults and walls; and that the plaintiffs were of right entitled that their vault or cellar should be so supported; and that there were foundations belonging to and supporting the plaintiffs' vault or cellar which the plaintiffs of right ought to enjoy; and that the defendant wrongfully and injuriously took down and removed the adjoining vaults and walls without shoring or propping up, or taking other reasonable or proper precaution to support or secure the plaintiffs' vault or cellar, so as to prevent it from being weakened or damaged; and wrongfully and injuriously dug near to the foundations thereof, without taking due and proper precautions to prevent them from being weakened and injured and from giving way, whereby the vault and foundations were weakened and injured, and by the fall of certain bricks and timber special damage ensued.

The Court held, that the substantial ground of action was stated; and that if the defendant intended to object that the plaintiffs' right and title were not set forth with sufficient certainty, he ought to have demurred specially and not to have pleaded over.

Where the plaintiff's vault was supported by the defendant's adjoining wall:—Held, that an action was maintainable for negligently removing the wall*.

(f) RELATIVE TO THE REPAIRS.

LANCHESTER *v.* FREWER, M. T. 1824. C. P. 2 *Bing.* 361.

UPON a special case it appeared, that on the 13th of April, 1811, the plaintiff and one William Tricker were appointed churchwardens

A parishioner who merely at-

* Trespass, and not case, is the proper form of action for taking away a tombstone from a church-yard, and obliterating an inscription made upon it. After a man's return from transportation, he may maintain trespass for injury done to a tombstone erected by his wife during his absence. (*Spooner v. Brewster*, E. T. 1825, N. P., 2 C. & P. 34).

Inscriptions on tombstones inviting to pray for the soul, &c., held not contrary to the articles or discipline of the Church of England; and in a libel containing an article for erecting such, without the consent of the incumbent first had, which was not contained in the original citation, as a distinct ecclesiastical offence:—Held that the article was inadmissible. (*Brooks v. Woolfrey*, 1 Curt., (Arches), 880).

tends a vestry when orders are given to repair a church, is not liable for contribution in the absence of an express contract.

of the parish of St. James, in the borough of Bury St. Edmunds, for the ensuing year; and that at that time the tower of the parish church was much out of repair, and had been presented by the preceding churchwardens on that account. That, on the 8th July, 1811, a meeting of the parishioners was duly held in the vestry room of the parish, when it was ordered, "that the churchwardens should be authorized to put a new roof on the tower belonging to the parish in a workmanlike manner." This order was signed by the plaintiff and Tricker and twenty other parishioners, of whom the defendant was one. In pursuance thereof several tradesmen were employed by the said churchwardens to make the repairs, and the tower was repaired in a workmanlike manner. The defendant was at first employed to do the plumber's work, and he was present in the town, and gave directions to the carpenters how the wood-work of the gutters should be laid to receive the lead, but the defendant did not eventually do any of the work. At another vestry meeting held on the 11th of January, 1812, it was ordered that a church-rate should be made of 4s. in the pound, amounting in the whole to 807*l.* 14s., upon all the occupiers of lands and houses within the parish to reimburse the churchwardens the several sums of money expended by them in repairing the tower and the other charges incident to their office as such. Several of the parishioners appealed against this rate, and it was afterwards quashed. Pending the appeal, the different tradesmen who had been employed became urgent for the payment of their bills, and actions were brought against the plaintiff, who was thereby compelled to pay several of them to the amount of 505*l.* for the repairs of the tower. The plaintiff being unable to obtain repayment of any part of the money he had so expended brought this action to recover one-twentieth part of the sum of the 505*l.* so paid by him.

Per Cur.—This being an action in which the plaintiff sought to recover contribution from the defendant, there must be either an express or implied contract on his part that the expenses incurred in making the repairs in question were ordered or authorized by him. It is clear that there was no express contract, nor are there any grounds for an implied one. Although he attended the vestry meeting and signed the order, he did not thereby intend to become answerable for the repairs.

NORTHWAITE *v.* BENNETT, M. T. 1834. Ex. 2 C. & M. 316.

ONE of several churchwardens gave orders to the defendant to make certain necessary repairs in the church, and it did not appear that the other churchwardens had authorized him to give such orders or to pledge their credit.

Per Cur.—We think it is the duty of a churchwarden to take care that there are funds to meet expenses of this nature. We apprehend that it would be a good answer in the ecclesiastical court in a case for not repairing, immediately to reply, that there was no time for making a rate for this purpose, and that no churchwarden has a right to pledge the credit of his co-churchwardens without their knowledge.

An order by one churchwarden to repair does not render the others liable.

(g) RELATIVE TO THE CHURCH-RATE.

1. *By whom and how made.*

REGINA v. ST. MARGARET'S, LEICESTER, T. T. 1840. Q. B. 2
P. & D. 510.

ON the question as to the validity of a church-rate—

The Court held, that before a churchwarden can compel the parishioners in vestry or a select vestry to make a rate, they are bound to furnish themselves with estimates and supply the particulars of the purposes to which the rate is to be applied, and a refusal to furnish the vestry therewith is a sufficient answer to a mandamus to make the rate.

Churchwardens have no right to a church-rate until they have procured estimates as to the repairs, &c.*

BLUNT v. HARWOOD, T. T. 1838. Q. B. 3 N. & P. 577; S. C. 8 Ad. & E. 610; *questioning* GARE v. GAPPER, 3 East, Rep. 472.

RULE for a prohibition to the Arches Court of Canterbury to prohibit all further proceedings in a suit there between these parties. It appeared that the plaintiffs are the churchwardens of the parish of Streatham, of which the defendant is a parishioner; and a libel was exhibited and filed in that Court against the defendant to enforce the payment of certain church-rates which he alleged to be illegal. The rate purported to have been made for the necessary repairs of the church, and for the repayment of portions of the sum of 3,300*l.*, borrowed in November, 1830, under the authority of the Church Building Acts, (58 Geo. 3, c. 45, and 59 Geo. 3, c. 134), and of the interest due on the residue. The defendant complained that the debt had not been legally contracted. The circumstances attending its creation as detailed in the defendant's affidavits were these:—On the 17th of March, 1830, a committee of the parishioners of Streatham was appointed to consider a plan for the enlargement of the parish church, which afterwards recommended that the same should be done at an expense not exceeding 3700*l.* On the 2nd of August a vestry meeting was held, at which it was resolved that this report should be confirmed and adopted, and that the churchwardens should borrow money. Previous to this meeting a notice was published in the parish church that the vestry would be held to receive the report of the committee; and according to the defendant's affidavit there was no notice of any intention to borrow the money or to adopt the plan. The Ecclesiastical Court had admitted the libel to proof but had not proceeded to sentence. In answer there was an affidavit by the vestry clerk, which stated, that the notice which had been lost and was only recently found was, that not only the report should be received but that such measures should be adopted as might appear necessary to carry the report into execution. The notice was not set out in this form in the proceedings in the Ecclesiastical Court.

As no particular form of notice of meeting is given by the Vestry Act (58 Geo. 3), nor Church Building Acts, (58 Geo. 3 and 59 Geo. 3), a notice that a report will be carried into effect is sufficient.

Per Cur.—No form of notice is given in the statutes; we have only therefore to see that such a form has been adopted as will inform the parish of what is intended to be done. Here, none of the

* Where the parishioners in vestry refuse to make a rate for necessary repairs, the churchwardens may make it of their own authority. (*Veley v. Burder*, 1 Curt. (Cons.), 372; supporting *Gaudern v. Selby*, Id. (Arches), 394).

parishioners could have been ignorant of what was intended. It must have been known to all, that it could not be done without the borrowing of money. As to any supposition that the money was to be raised by pew-rents, there is no power to do any such thing. It is only under the authority of an act of Parliament that any parishioner can be called upon to pay for a pew. No objection was raised to the borrowing of the money, though we do not say that any person is estopped from alleging that the rate is illegal. There is, however, no reason why the prohibition should issue. We are not satisfied that we have authority to issue it.

REX *v.* ST. MARY'S, LAMBETH, T. T. 1832. K. B. 3 B. & Ad. 651.

If the parishioners consent to the churchwardens borrowing money under 58 Geo. 3 and 59 Geo. 3, it amounts to a consent to make a rate.

THE inhabitants of a parish had made an application to the commissioners for building new churches conformably to 58 Geo. 3, c. 45, s. 14, and 59 & 60 Geo. 3, c. 134, s. 24, and had in consequence obtained a loan for the purpose of building churches within the parish.

The Court held, that the churchwardens might make a rate for repaying the interest and principal (as directed by s. 61 of the first-mentioned act), without any further consent of the parishioners to such rate.

REGINA *v.* ST. MARGARET'S, LEICESTER, T. T. 1839. Q. B. 1 P. & D. 116.

If the proceedings of a special vestry be merely colourable to avoid making a rate, a mandamus will be granted*.

A LOCAL act required the special vestry to make a rate for the support and repair of the church, and gave them special powers for collecting, &c.

The Court held, first, that the Court had jurisdiction to enforce the performance of the duty imposed by the act, notwithstanding a saving clause as to any ecclesiastical jurisdiction; secondly, that the requisition being in the alternative was sufficient although one of the alternatives might be illegal; and that the proceedings of the vestry being merely colourable with a view to delay amounted to a refusal. A mandamus therefore granted.

2. *Of the Persons and Things chargeable.*

REX *v.* BARKER, T. T. 1837. K. B. 6 Ad. & E. 388; REX *v.* BUCKINGHAM, JUSTICES OF, E. T. 1837. K. B. 1 N. & P. 503.

The lessee of tithes must contribute to a church-rate†.

TRUSTEES were by an act empowered to borrow money for building a church and to make rates on the full annual rent or value of all houses &c., tenements and hereditaments &c., rated to or rateable to the poor on all the tenants or occupiers thereof.

The Court held that a lessee of tithes was liable to be rated, and that a mandamus would lie to compel justices to issue distress war-

* But in general churchwardens cannot be compelled by mandamus to make a rate. (*Rex v. Wilson*, H. T. 1826, K. B., 5 D. & R. 602; Abridg. post, tit. *Mandamus*).

† The governor of Greenwich Hospital, formerly part of a royal demesne, held not exempted from the liability to be assessed to the rate in respect of the premises occupied by him. (*Smith v. Keats*, 4 Hagg., (Cons.), 275).

rants which they had refused on the ground that tithes were not liable to be rated under the act.

CRAVEN *v.* SAUNDERSON, T. T. 1838. Q. B. 8 *Ad. & E.* 880; S. C. 2 *N. & P.* 641.

IN prohibition of a suit for payment of a rate for the repairs of the parish church, upon the question whether the occupiers in a township, H., were properly omitted, the plea alleged that the chapel in question (with others) was not built in aid of the parish church, and that there was and immemorially had been a chapel at H., at which all the inhabitants of H. received and enjoyed all manner of divine rites and services, and that the costs of repairing and providing necessities for those purposes were and had been immemorially defrayed by rates upon the occupiers in H.

But, a township which supports its own chapel is exempt from a rate for supporting the parish church.

The Court held, 1st, that from the facts stated in the plea, it must be intended that the chapelry was coeval with, and exempt from contributing to the repairs of, the mother church; and 2dly, that by the addition of the word "place" in the Church Building Acts, other divisions than parishes were intended to be governed by their provisions, and that the plea was good, as disclosing a substantial defence at common law and open to no objection from the recent statute.

3. *May be retrospective.*

REX *v.* SILLIFANT, M. T. 1835. K. B. 5 *N. & M.* 640; S. C. 4 *Ad. & E.* 354.

A CHURCH-RATE on the face of it purported to be "for the repairs of the church of the said parish, and for such other purposes as a church-rate is by law applicable for the present year;" but which was in fact made principally for the purpose of reimbursing the churchwarden for monies expended by him as such during the previous year. One George Nichols, an inhabitant occupier of lands, being assessed in such rate at the sum of 4*l.* 10*s.* 4*d.*, appeared before the Consistorial Court of the bishop of Exeter and made objection to the rate that the glebe lands were not rated. This objection was, however, overruled, and the rate was confirmed in due form on 23rd May. Nichols having refused to pay to the churchwarden the rate, a summons was obtained, when it was objected, that the rate was made in order to reimburse the churchwarden for money previously expended by him as churchwarden, whereas by law a rate could not be made for such purposes. The magistrates upon this dismissed the summons, and refused to make any order for the payment of the rate. On motion for a mandamus—

A church-rate may be retrospective, but if questioned in the Ecclesiastical Court, though held to be valid, it cannot be enforced by justices under the 53 Geo. 3.

Per Cur.—It is very doubtful whether this is not exactly within the description of cases to which the jurisdiction of the justices does not apply, and therefore they could not be called upon to issue a warrant. But Lord Denman, C. J., said, "We are quite satisfied that it is no valid ground of objection that the rate is retrospective, as it is good upon the face of it."

REX *v.* DURSLEY, E. T. 1836. K. B. 6 N. & M. 333; S. C. 5 A. & E. 10.

But money can-
not be borrowed
for repairs al-
ready done; nor
is a rate to pay
such money
legal.

A RULE had been obtained for a mandamus to the churchwardens of the parish of D., commanding them to pay to one Warner the instalments which had become due and remained unpaid of the sum of 350*l.*, borrowed under the provisions of the statute 59 Geo. 3, c. 134 (the Church Building Act), and also the arrear of interest due upon the sum of 300*l.*; or to raise by rate, pursuant to the statute, a sum sufficient for that purpose, and to pay the same over to Mr. Warner. It appeared that the sum of 350*l.* was advanced by way of loan by Mr. Warner in 1832, to the then churchwardens of the parish of D., towards defraying the expenses of repairing the parish church. This sum was borrowed from Mr. Warner with the consent of the vestry of the parish, and of the incumbent, and of the bishop, pursuant to the 14th section of the act; and the churchwardens duly executed a deed of charge on the church-rates for 350*l.*, and the repayment thereof with interest, Warner at the same time receiving a bond of the same date with the deed of charge, executed by the churchwardens and several other persons who were at that time parishioners. The instalment which became due, according to the deed of charge, in February, 1833, and all interest up to that time, were paid, and Warner had received the interest on the remaining principal of 300*l.* up to the 27th August, 1834. On the affidavit in opposition to the rule, it appeared that the repairs, to pay off the expenses of which the sum of 350*l.* was borrowed of Warner in 1832, were done, and those expenses incurred in 1824 and 1825; that the churchwardens had made a rate, nevertheless, sufficient to pay the instalment of 50*l.* alleged to be due, and interest thereon; but that the inhabitants refused to pay it, on the ground that, as the debt had been incurred before they became rate-payers, they should resist it.

The Court held that churchwardens have no power, by the 14th section of 59 Geo. 3, c. 184, to borrow money for the payment of repairs done in previous years. That section gives them only a prospective power to borrow money for repairs which are to be done, and not for those which have been done.

4. *Of the Non-payment of the Rate*.*

REGINA *v.* FENTON, T. T. 1840. Q. B. 1 Gale & D. 17.

If churchward-
ens act sepa-

THE parish was divided into districts; and there were several churchwardens appointed for the parish, but they acted separately

* By a local act, persons who refused to pay a church-rate, thereby empowered to be levied, were to be summoned before a magistrate; and if they then refused, the magistrate was authorized and required to grant a distress warrant to levy the amount. A tithe-owner having refused to pay the rate, on the ground that tithes were not ratable under the act, the magistrate refused to grant a distress warrant; but the Court of K. B. issued a mandamus to the magistrate to compel him to do so. (*Rex v. Buckinghamshire (Justices)*, 1 Nev. & P. 503; Abridg. post. tit. *Mandamus*).

On an indictment for a conspiracy to resist the payment of church-rates:—Held, that a witness might be asked, on cross-examination, as to any appeals having been made against the rates, but not as to what trustees had done in reference thereto, their proceedings being required by the local act to be entered,

in each district. A church-rate having been made and payment refused, a complaint was made to the justices in order to enforce payment by one churchwarden only.

ately in districts, the complaint may be made by one.

The Court held that a complaint before a justice under 53 Geo. 3, c. 127, s. 7, for non-payment of a church-rate, might be laid by one against a party in his district.

REGINA v. JUSTICES OF ST. CLEMENTS IPSWICH, E. T. 1840.
Q. B. 3 P. & D. 481.

IN this case the Court decided that an order of justices, made upon the complaint of churchwardens de facto, although not de jure, is good; nor are they precluded from making it by the circumstance of a suit having been commenced for the rate in the Ecclesiastical Court, but abandoned before the complaint made.

An order of justices, founded upon a complaint made by churchwardens de facto, though not de jure, is good.

5. *Of the Appeal against the Rate.*

REX v. JUSTICES OF STAFFORDSHIRE, E. T. 1836. K. B. 6 N. & M. 477; S. C. 4 A. & E. 842.

THE defendant having been summoned before two justices, pursuant to 53 Geo. 3, c. 127, s. 7, for non-payment of a church-rate, was ordered to pay it. He gave notice to the two justices and to the churchwardens that he should, at the next Lady Day sessions for Staffordshire, move to enter and respite the appeal, which was done. Previous to the Midsummer sessions, he gave notice of trying the appeal to the then churchwardens and to one of the justices who made the order. The sessions refused to hear the appeal, because notice of trial had not been served on both the justices, according to the practice of the sessions. A rule nisi for a mandamus to the justices to hear the appeal had been obtained.

The notice of appeal may be given to the churchwardens, and not the justices making the order.

Lord Denman, C. J.—The sessions have no right to introduce a new condition of appeal which is not in the statute: but if notices to the justices were necessary, service on one would be sufficient.

6. *Of the Jurisdiction of the Courts in trying the validity of the Rate.*

GRIFFIN v. ELLIS, H. T. 1840. Q. B. 10 A. & E. 743; S. C. 3 P. & D. 398.

A SUIT had been commenced in the Ecclesiastical Court by churchwardens for a church-rate. The rate was free from objection on the face of it; but it was stated by the party sued, in his deposer's allegation, and admitted by the churchwardens in their allegation responsive, that it was made in part to pay a debt incurred at a former period. On motion for a prohibition, it was contended that the writ of prohibition assumes the Court Christian to have exceeded its

The decision of the Ecclesiastical Court in favour of a church-rate, good on the face of it, will not be questioned in the Q. B.;

and allowed to be read in evidence in all cases. (*Reg. v. Murphy*, 1837, N. P., 8 C. & P. 297).

jurisdiction, which was only a ground of appeal, the suit itself being matter of ecclesiastical consuance.

Per Cur.—It has been often held, that erroneous judgments on matters within the consuance of the Court will not entitle the party to prohibition, but only to an appeal. If on appeal their sentence should be of such a nature as to shew a defect of jurisdiction on the face of the proceedings, application to prohibit may then be made. In the mean time, we must presume the Court Christian will correctly administer the law under which they sit.

RICKETTS *v.* BODENHAM, H. T. 1836. K. B. 6 N. & M. 170;
S. C. 5 D. P. C. 120.

To induce the Court to interfere there must be an entire want of jurisdiction.

By the 53rd Geo. 3, c. 157, s. 7, it is enacted, "That if any one duly rated to a church-rate or chapel-rate, the validity whereof has not been questioned in any Ecclesiastical Court, shall refuse or neglect to pay the same sum at which he is so rated, it shall and may be lawful, &c., for two justices to direct payment, so as the sum directed to be paid shall not exceed 10*l.* over and above the costs and charges, &c.: Provided also, that nothing herein contained shall extend to alter or interfere with the jurisdiction of the Ecclesiastical Courts, to hear and determine causes touching the validity of any church-rate or chapel-rate, or from proceeding to enforce the payment of any such rate, if the same shall exceed the sum of 10*l.*, from the party proceeded against: Provided likewise, that if the validity of such rate, or the liability of the person from whom it is demanded to pay the same, be disputed, and the party disputing the same give notice thereof to the justices, the justices shall forbear giving judgment thereupon; and the person or persons demanding the same may then proceed to the recovery of their demand, according to due course of law, as heretofore used and accustomed."

The Court held, that the jurisdiction of the Ecclesiastical Court is not taken away in all cases where the rate is under 10*l.*, but only in those cases where the validity of the rate, and the liability of the person, are admitted; that no prohibition, therefore, would lie to the Ecclesiastical Court, after sentence in a suit for less than 10*l.*, as no want of jurisdiction would appear upon the face of the proceedings, arising from the mere fact of its being for less than 10*l.*

JOLLY *v.* BAINES, T. T. 1840. Q. B. 4 P. & D. 225.

Letters of request lie to remove a suit for subtraction of church-rate into the Court of Arches*.

UPON a rule calling upon the plaintiffs to shew cause why a writ of prohibition should not issue to the Arches Court of Canterbury, to prohibit it from further proceeding in the suit between the parties—

Per Cur.—It has been objected that the suit for subtraction of church-rates cannot, by the law civil or canon, be moved by letters of request to the superior Ecclesiastical Court; and therefore is not within the exception of the statute 23 Hen. 8, c. 9. No authority was cited for this position, nor was any reason assigned at the bar

* But a libel in the Arches Court, for a subtraction of rates under 58 Geo. 3 and 59 Geo. 3, must shew a compliance with the statutes. (*Blunt v. Harwood*, T. T. 1833, Q. B., 8 A. & E., 610; S. C. 3 N. & P. 577; S. C. 1 Curt. (Arches) 648; Abridg. ante, p. 575).

why a suit for subtraction of church-rates might not be so referred, as well as a suit for subtraction of tithe, or for brawling, or for any other contentious matter; but it was said by counsel that they were not aware of any instance in which it had been done. We have made inquiry, and find suits for subtraction of church-rate have frequently been refused by letters of request, and no objection has been made on that ground; although in several such instances a prohibition has been moved for on some other ground. The ground usually assigned by the letters of request is, that the parties, when in the superior Court, can have the benefit of counsel learned in the law, whose assistance they cannot have in the inferior jurisdiction; and this is obviously applicable to the case in question. We see, therefore, no reason to doubt that the letters were in this case proper.

REX *v.* WROTTESLEY, M. T. 1830. K. B. 1 B. & Ad. 648.

THIS case came before the Court in the form of a rule, calling upon two justices of Wilts to shew cause why a mandamus should not issue, directed to them, commanding them to meet together and examine upon oath into the merits of the complaint of James Jay, one of the churchwardens of the parish of Tisbury, against one Rice Everett, an inhabitant of the parish, for refusing to pay 4*l.* 2*s.* 6*d.*, assessed upon him by a rate made for defraying the expenses of repairing the parish church, and other expenses incurred by the churchwardens in the execution of their office; and to hear and determine the said complaint, and give judgment thereon, pursuant to the statute 53 Geo. 3, c. 127. It appeared that a caveat had been entered in the Ecclesiastical Court, for the purpose of questioning the rate; but nothing further had been done.

Per. Cur.—If the validity of the rate be questioned—fairly and bonâ fide questioned—the justices cannot proceed; but the justices must hear what the man says, in order to avoid the absurdity of letting him off merely because he chooses to say he disputes the rate. Therefore, let the mandamus go to hear the parties; if they satisfy the justices that there is a bonâ fide dispute, and state the grounds of the dispute, they may refuse to interfere any further; but they should hear the parties. Rule absolute.

A mere statement that the rate is disputed, and a caveat entered in the Ecclesiastical Courts, does not oust the sessions of their right to inquire into the validity of the rate.

NEWELL *v.* SIMPKIN, E. T. 1830. C. P. 6 Bing. 565; S. C. 4 M. & P. 395.

THIS was an action brought against the churchwardens of a parish for the purpose of trying the validity of a rate. Rule nisi, that the plaintiff might be permitted to inspect and make extracts from the parish books. The defendants stated their willingness to comply with any thing the Court might suggest; but submitted that it should be made a part of the rule that the plaintiff should pay any costs that might necessarily be incurred.

Tindal, C. J., observed, that the Court of King's Bench had granted *like motions* in the cases of *St. Giles's-in-the-fields*, *St. Martin's-in-the-fields*, and *St. Paul's, Covent Garden*. The Court of King's Bench had not allowed costs, and the Common Pleas should pursue the same course.

In an action to try the validity of a church-rate, the plaintiff is entitled to inspect and take copies of the parish books; but the Court made no order as to costs.

(h) RELATIVE TO THE BRIEFS AND COLLECTIONS*.

II. AS TO CHAPELS.

(a) RELATIVE TO THE RIGHTS OF THE OWNER.

REVETT v. BROWN, T. T. 1828. C. P. 5 *Bing.* 7; S. C. 2 *M. & P.* 12.

Where the owner of the chapel only allows the preacher to have the key for the purpose of preaching, the latter has not such a possession as to maintain trespass.

THE plaintiff by deed assigned all his property in trust for the payment of his debts. The defendants, as the agents or servants, and by the command of the trustee, forcibly entered and took possession of a chapel, (part of the estate), in which the plaintiff was occasionally in the habit of preaching, and the key of which he held at the time,—not however as a symbol of possession, but merely to enable him to preach there. In trespass for the breaking and entering, *Garrow*, B., told the jury, that, whether the execution of the deeds had been fraudulently obtained or not, was a question for the decision of a court of equity; and that the only matter for them to consider was, whether under the circumstances the plaintiff had or had not such a possession of the chapel as would entitle him to maintain the action. The jury returned a verdict for one of the defendants, (who did not appear to have taken any active part in the breaking open of the chapel), and for the plaintiff against the other two. Damages 40s.

Per Cur.—We do not deem it necessary to decide whether or not the deeds in question conveyed a legal title to the trustee. Possession will certainly entitle a party to maintain trespass, but that possession must be clear and exclusive. The plaintiff here had not such a possession. We think there was not sufficient evidence adduced to warrant the jury to assume that the possession was changed. The plaintiff was not shewn to have held the key of the chapel as a symbol of possession, but merely for the purpose of his preaching there. That clearly was not sufficient to support trespass.

Rule absolute for a nonsuit.

(b) RELATIVE TO THE CONSECRATION†.

(c) RELATIVE TO THE LIABILITY OF THE CHAPEL-WARDENS‡.

(d) RELATIVE TO THE PREACHER§.

* Church briefs abolished, and collections regulated by 9 Geo. 4, c. 42.

† Where a chapel has been duly consecrated the incumbent of the parish does not require any license to perform divine service therein. (*Moysey v. Hellicat*, 2 Hagg. Rep. 30).

‡ Two chapel-wardens are not liable jointly for goods ordered by one. (*Shaw v. Hislop*, 1824, K. B., 4 D. & R. 241).

§ Where, before the 1 & 2 W. 4, a suit was instituted by the incumbent of a parish against the defendant for performing divine service without lawful authority in a chapel newly erected within the parish, and endowed by an individual as a chapel of ease, with the sanction of the bishop:—Held, that, as by the general law the concurrent consent of patron, incumbent, and ordinary, would have been necessary but for the 7 & 8 Geo. 4, c. 72, (Church Building Act), the provisions of that act must be shewn to have been strictly complied with; and

(e) RELATIVE TO THE BURIAL GROUND.

SPRY *v.* EMPEROR, M. T. 1840. Ex. 6 M. & W. 639.

By the 51 Geo. 3, c. 151, the vestry of the parish of St. Marylebone were empowered to provide an additional cemetery for the said parish, and to erect a chapel therein; and by sect. 41, it was enacted, that the lay-rector should from time to time appoint a minister to officiate in burying the dead in the said cemetery, and a reader to perform divine service in the said chapel; and he was empowered (in case it should seem right to the vestrymen) to appoint another minister to be preacher in the said chapel, also to appoint a clerk and sexton with the approbation of the vestrymen; and it was thereby enacted, that the said reader, preacher, clerk, and sexton, should receive for their salaries a yearly sum as the said vestrymen should appoint. By sect. 89, nothing in that act contained was to lessen or alter the right or title of the lay-rector for the time being to the ecclesiastical duties, &c., belonging thereto. By a subsequent act, 1 & 2 Geo. 4, c. 21, (passed to enable the vestry to effectuate the building of four district churches), it was enacted, that the parish should remain and be one entire and undivided parish for all ecclesiastical, civil, and other purposes. By the 6th section of the 6 Geo. 4, c. 124, (by which act the four districts were for certain purposes made district rectories), the district rectors were empowered to solemnize marriages and take the fees for the same. By sect. 9, nothing in that act contained was to be construed to alter or in any way affect the law respecting burials or burial fees within the parish. Before the passing of the 51 Geo. 3, c. 151, the incumbent (or minister) for the time being of the said parish, by himself or his curates performed the duty upon all burials which took place therein, and received the surplice fees for such burials for his use, and such fees formed part of the profits of that living. In 1824, W. was nominated by the Crown, (which had acquired the rights of the lay-patron), to the chapel built under the provisions of that act; and thenceforth performed (amongst other duties) all the burials in the cemetery. The plaintiff was appointed rector of the parish in August, 1825, and since the consecration of the cemetery the burial fees had been regularly received by the plaintiff and his predecessor, minister of the parish, until the year 1839, when the defendant by the direction of the vestry received and detained them.

The Court held, that the plaintiff was entitled to the fees so received, and might recover them from the defendant in an action for money had and received.

where, therefore, the formal proceedings of the Board of Commissioners had been postponed until their powers had been more defined by Parliament, and in the mean time the suit was instituted, the defendant could not be deemed to have a legal authority for the performance of ecclesiastical duties in the chapel within the 7 & 8 Geo. 4, c. 72, s. 3. (*Büss v. Woods*, 3 Hagg. (Arches), 486).

* Where by the local act the vestrymen were authorized to settle and fix the burial fees of a new burial ground, but which they had neglected to exercise:—Held, that there were no fees legally existing, notwithstanding a proviso that they should not reduce them below the fees then paid for burials in the other existing burial grounds in the parish, and the libel for subtraction of fees rejected. (*Spry v. Marylebone (Directors and Guardians)*, 2 Curt. (Cons.), 5).

If there be a burial ground* attached to a chapel under a local act by which a minister is to be appointed, and no mention is made as to the burial fees, the lay-rector of the parish is entitled to them, he having received them before the passing of the statute.

Churchwardens*.

(See *tit. Apprentices—Churches and Chapels—Mandamus—Overseers—Poor—Quo Warranto*).

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I. OF THE PERSONS ELIGIBLE AS†.

REX v. WIX, T. T. 1831. K. B. 2 B. & Ad. 197.

A custom, not immemorial, that churchwardens shall act as overseers, is bad.

A CUSTOM, set out in the return to a mandamus to the inhabitants of a parish to elect churchwardens, that the overseers time out of mind had been used to perform the duties—

The Court held the custom bad: the appointment of overseer not having immemorially existed, and there having been antecedently persons discharging those duties. And in case of disobedience the Court would grant a criminal information against the inhabitants on whom the writ had been served.

II. OF THE ELECTION AND SWEARING IN.

REX v. ST. JAMES'S, WESTMINSTER, M. T. 1836. K. B. 5 Ad. & E. 391.

The mode of election adopted—

By stat. 1 Jac. 2, c. 22, (1685), the parish of St. James's, Westminster, was created by dividing a district from the parish of St.

* Churchwardens are the guardians of the church and representatives of the body of the parish. (1 Bla. Com. 394).

† All persons having legal capacity are bound to serve.

A partner in a house of trade is not exempted from serving the office of churchwarden from the circumstance of his not actually residing there; (see *And. on Churchwardens*, 179): and in the case of *Ford v. Chauncey*, (cited *And. on Churchwardens*, 182), in which it appeared that the party exercised the trade of a linen-draper, and the father occupied the house and kept it; the son lived as boarder with the father and was a partner; the rent was paid out of the profits of the business; the son was chosen churchwarden: and the Court held, that, though he would not have been liable as an inmate, he was as a partner. So, in the case of *Bolton v. Lachary and Stevens*, (cited *And. on Churchwardens*, 182), the defendants were elected churchwardens, and L. pleaded that he was an inhabitant of another parish; and S. set forth "that he was of the parish of C., and therefore that neither of them were of the parish for which they had been chosen; that in their house of trade a servant only slept:" but the Court held them liable. (See *Stephenson v. Longston*, 1 Const. 379). The Court declined to compel a quaker, elected churchwarden, to take upon him the office. (*Adey v. Theobald*, 1 Curt. (Eccl.), 447).

Martin; and it was enacted, that the inhabitants of St. James's, "shall be from time to time subject to the laws and statutes now in force, or hereafter to be made for the choice of churchwardens, &c., and such other like parish officers, and other parochial duties within the said parish in like manner as the inhabitants of the said parish of St. Martin's are or might be subject and liable unto." St. Martin's had been governed by a select vestry, and provision was made for continuing such a vestry in St. James's. Before 1685 the practice in St. Martin's on the election of the two churchwardens had been, that the vestry chose them by scoring certain prepared lists, (the greatest number of scores carrying the election), but by usage the junior churchwarden of the preceding year was re-elected of course. It did not appear how or when this practice originated. The power of the select vestry to choose the churchwardens was often disputed in St. Martin's after 1685, and for the last two years the elections by them were discontinued and the officers chosen according to stat. 58 Geo. 3, c. 69. No alteration was made in St. James's.

ed in 1685 may still be pursued in the parish of St. James's.

The Court held, that the mode of election practised in 1685 was one of the laws then in force, by which, under stat. 1 Jac. 2, c. 22, the parish of St. James's was to be governed, and that the abandonment of the custom by St. Martin's did not oblige St. James's to discontinue it also.

CAMPBELL *v.* MAUND, M. T. 1836. Q. B. 1 N. & P. 558; S. C. 5 Ad. & E. 865.

STURGES BOURNE's act, (58 Geo. 3, c. 69), giving a plurality of votes to rate-payers according to their rating, exempts (s. 8), from its provisions any vestry holden by virtue of any special act, or of any usage or custom. The local parochial act for Paddington, (5 Geo. 4, c. 126), enacts, "that the election of churchwardens shall be conducted from year to year in such manner as hath been usual in the same parish." It was proved in evidence that the mode of electing churchwardens had been by shew of hands, no poll ever having been demanded.

Under the 5 Geo. 4, the electors vote according to their rating.

The Court held, that this was no evidence of a custom to exclude the granting of a poll when properly demanded; and, therefore, that the mode of electing churchwardens in Paddington before the 58 Geo. 3, was by shew of hands, with a power of going to a poll, in which case single votes carried the election; and that Sturges Bourne's act having given such voter a plurality of votes according to his estate, a shew of hands, with a power of demanding a poll, and plurality of voting was the mode of election at the time of passing the local act, (5 Geo. 4), and continued by it. (s. 10).

REX *v.* ARCHDEACON OF CHESTER, E. T. 1834. K. B. 3 N. & M. 413; S. C. 1 Ad. & E. 342.

A NOTICE was given, that a meeting for the purpose of electing overseers would be holden at the parish church, and that, if a poll was demanded, the meeting would be immediately adjourned to the town-hall for the purpose of taking the poll. A meeting at the parish church was held on the 9th of April, when the list prepared by the retiring churchwardens was proposed, and several other lists were proposed, one of which contained the names of the parties now

The chairman has not the right to adjourn where a poll is demanded; the right is in the parish at large, unless he

has given previous notice.

applying to be sworn in, and a poll was demanded, and an adjournment of the meeting by the chairman, which was objected to at the time, took place pursuant to the notice, when the poll being proceeded with, the list proposed by the churchwardens was carried by a great majority.

The Court held, that the right of adjourning a parish meeting for the election of overseers is in the parish at large, and cannot be exercised by the chairman; but that an adjournment by the chairman, pursuant to that notice, was valid; and an election by a majority, upon that poll so immediately proceeded with, good.

REGINA v. ST. MARY, LAMBETH, T. T. 1837. Q. B. 3 N. & P. 416.

If vestry doors be closed at an election of churchwardens, it is not illegal, unless any voter be excluded.

ON motion for a mandamus—

The Court held, that closing the vestry doors at an election of churchwardens under 59 Geo. 3, c. 69, so as to exclude voters, would be illegal; yet where, in fact, no voter was excluded from voting, a mandamus for a fresh election must be refused.

LOWE, *Ex parte*, T. T. 1835. K. B. 4 D. P. C. 15.

A mandamus to compel the officer to swear in the churchwardens is absolute in the first instance.

ON motion for a mandamus to be directed “to the precentor of the cathedral church of St. Peter, in Exeter, and official of the dean and chapter of the said cathedral church,” to swear in the applicant as a churchwarden of the parish of Topsham, he having been regularly appointed—

Per Cur.—The rule is absolute in the first instance.

REX v. ARCHDEACON OF MIDDLESEX, M. T. 1835. K. B. 5 N. & M. 494; S. C. 3 Ad. & E. 615.

The archdeacon is bound to swear in the churchwardens, though two sets claim colourable titles.

ON motion for a mandamus, it appeared that two sets of churchwardens claimed to be duly elected. On application, immediately after the election, to the surrogate at his chambers to be admitted, the surrogate answered that he did not know that he could admit them until the visitation of the archdeacon, it being the practice of the archdeaconry to swear in the churchwardens at that time, and refused to admit them on that ground—

Per Lord Denman, C. J.—It is to be lamented that the surrogate did not swear in the parties upon their application to him for that purpose. I think, that, on the facts, there was a refusal by the surrogate. His answer amounts to this:—I will not admit you now when you call upon me to do it, on account of the existence of a custom in the archdeaconry of Middlesex to swear in the churchwardens upon the first visitation after Easter, which will be on the 9th of May. The churchwardens had a right at that time to be admitted; and it appears to me, therefore, that this rule must be made absolute, with which the rest of the court concurring,—Rule absolute.

REGINA v. RECTOR OF BIRMINGHAM, E. T. 1839. Q. B. 7 Ad. & E. 254.

If there be no clear remedy

THE election of a churchwarden had taken place under circumstances which were alleged to have rendered it void; and there was

no clear remedy for putting the case in the way of investigation. On motion for a mandamus—

The Court granted it to the rector and churchwardens to convene a vestry for the election of one for the rest of the year; the refusal to take the shew of hands, which would not, under 58 Geo. 3, c. 69, decide the number of votes, was not a valid objection.

for investigating the election of a churchwarden, a mandamus will be issued.

III. OF THE RIGHTS OF*.

DOE *d.* HIGGS *v.* COCKELL, H. T. 1836. K. B. 6 *N. & M.* 179; S. C. 4 *Ad. & E.* 478.

IN ejectment, it was proved that the lessors of the plaintiff were the churchwardens and overseers of the poor of the said parish of St. Mary, Reading, at the time of the action being commenced and of the demise in the declaration. A rent of 1*l.* 10*s.* per annum had been paid by the predecessors of the defendants in the tenancy to the different successive churchwardens of the said parish for many years prior to the passing of the statute 59 Geo. 3, c. 12; and since that act came into operation, the rent had continued to be paid in like manner by the predecessors of the defendants, and by the defendants down to the time of the expiration of the following notice to quit—

The Court held, that evidence of payment of rent to churchwardens in their character of churchwardens is sufficient evidence of the buildings, &c., for which that rent was paid, being parish property, so as to vest in the churchwardens for the time being the property in the buildings, by the operation of the statute 59 Geo. 3, c. 12, s. 17.

Lands had been leased by churchwardens prior to the 59 Geo. 3:—Held to be evidence of it being parish land, which passed to the succeeding churchwardens.

DOE *d.* HIGGS *v.* TERRY, M. T. 1835. K. B. 5 *N. & M.* 556.

IT was proved, that the lessors of the plaintiff were the churchwardens and overseers of the poor of the said parish of St. Mary, Reading, at the time of the action being commenced and of the demise in the declaration. A rent of 1*l.* 10*s.* per annum had been paid by the predecessors of the defendants in the tenancy to the different successive churchwardens of the said parish for many years prior to the passing of the statute 59 Geo. 3, c. 12; and since that act came into operation, the rent had continued to be paid in like manner by the predecessors of the defendants, and by the defendants down to the time of the expiration of the notice to quit.

The Court held, that evidence of payment of rent to churchwardens in their character of churchwardens is sufficient evidence of the

So, payment of rent to churchwardens, and proof of their having granted previous leases, are evidence of the land being parish land.

* It seems that the churchwardens have a right of refusing to suffer a wardmote to be holden in the church; (see 2 *Ld. Raym.* 777; 7 *Mod.* 29; *Holt*, 331; 2 *Salk.* 425); and they are entitled to lay out the parish money as they please, provided they do not do it imprudently and improvidently; hence, if it be laid out truly and honestly, they have a right to be reimbursed; and the parishioners have no remedy in the absence of fraud or deceit, because the parish have made them their trustees: but, if they act imprudently, complaint must be made to the ordinary, who will interpose. (See *Gibs*. 196). Churchwardens have no power to interfere in the administration of divine service, for this is the immediate province of the rector or vicar, subject to the cognisance of the ordinary. (See *And.* on Churchwardens, 199).

buildings, &c., for which that rent was paid, being parish property, so as to vest in the churchwardens and overseers for the time being the property in the buildings, by the operation of the statute 59 Geo. 3, c. 12, s. 17.

PHILLIPS *v.* PEARCE, E. T. 1826. K. B. 5 B. & C. 433; S. C. 8 D. & R. 43.

Before 59 Geo. 3, c. 12*, churchwardens could not transfer parish land.

LAND belonging to a parish was occupied by A., and he paid rent to the churchwardens. They executed a lease of the same land for a term of years to B., and gave A. notice of the lease. In an action for use and occupation by B. against A., it was contended, on the part of the plaintiff, that the defendant, by having paid rent to the churchwardens, had admitted their title, and that he could not, therefore, dispute that of the plaintiff, which was derived from the churchwardens. *Alexander, C. B.*, was of opinion, that the lease granted by the churchwardens was void, and he directed the plaintiff to be nonsuited—

Per Cur.—Many inconveniences have been experienced in consequence of lands belonging to parishioners who are not by law a corporation. The legislature has provided a remedy for these inconveniences in certain cases by the statute 59 Geo. 3, c. 12, s. 17, which enacts, that the churchwardens and overseers shall take and hold in the nature of a body corporate for and on behalf of the parish, all buildings, lands, and tenements belonging to the parish. That statute does not extend to this case. We think, therefore, that the churchwardens alone had no title to the land.

IV. OF THEIR AUTHORITY BEING JOINT AND SEVERAL†.

REX *v.* MARSH, T. T. 1836. K. B. 6 N. & M. 668.

In a parish there were four tithings, and a churchwarden for each; but all were sworn to execute the office generally:—Held, a notice to one was sufficient.

A COMMISSIONER acting under the general and local inclosure acts, in ascertaining boundaries, gave the required notice to one churchwarden, appointed by a district of the parish, it appearing that there were four tithings in the parish for each of which a churchwarden was appointed, and who acted only within his own district, except signing the presentments to the archdeacon, but all were sworn to execute the office within the parish—

The Court held, that each was to be deemed a churchwarden of the whole parish, and service of the notice upon one a sufficient compliance with the requisites of the act.

* Constituting churchwardens and overseers a body corporate to take and hold parish lands. See *Allason v. Stark*, 9 Ad. & E. 255; *Doe d. Norton v. Webster*, 4 P. & D. 270.

† Churchwardens must act jointly and together; for what one does without the other has no legal operation; therefore, a release by one is no bar to an action by the other. (See *Cro. Jac.* 234; *Yelv.* 173). So, one churchwarden cannot dispose of the goods of the parish; (see *Cro. Jac.* 234); nor can both; (see *Yelv.* 173; 1 *Rol.* 393); unless the parish consents. (1 *Roll.* 393). But one may present without doing it in conjunction with the other.

V. REMEDIES BY AND AGAINST*.

ADDISON *v.* ROUND, E. T. 1836. K. B. 6 N. & M. 422; S. C. 4 Ad. & E. 799.

A SURVEYOR of the highways quitting office (before statute 5 & 6 Will. 4, c. 50) claimed a sum as due to him from the parish; and on the sum being guaranteed to him agreed to deliver up his books. The sum was afterwards paid. In pursuance of a resolution of the vestry, the books were demanded of him by the then churchwardens; and, in a subsequent year, they were also demanded by the churchwardens of the latter year.

A churchwarden cannot maintain trover against a surveyor of highways for not delivering up his books.

The Court held, that the churchwardens and overseers of the latter year were not entitled to maintain trover for the books. And semble, that no parish officer of any year was so entitled.

NORMAN *v.* DANGER, E. T. 1829. Ex. 3 Y. & J. 203.

AFTER the trial of an action of trespass against a churchwarden, in which the plaintiff was nonsuited; on motion, *Gaselee, J.*, before whom the case was tried, granted his certificate to entitle the defendant to double costs under the statute 7 Jac. 1, c. 5. A rule was obtained to set aside that certificate—

Per Cur.—The words of the statute are, “that if the verdict shall pass with the defendant, or the plaintiff therein become nonsuit, or suffer any discontinuance thereof, in every such case the justice or justices, or such other judge before whom the said matter shall be tried, shall allow unto the defendant double costs.” If it had said that he shall do so in open Court, at the trial, as some statutes do, then, it is evident that the allowance could only be made immediately after the trial. It does not, however, so enact, but leaves it open; and the construction of statutes in *pari materiâ* has latterly been, that in such cases the Judge may grant his certificate within a convenient time.

A certificate giving double costs to a churchwarden under the 7 Jac. 1, c. 6, may be granted at any time.

See *Harper v. Can*, 7 T. R. 448.

* Churchwardens can bring no action after their year of office; but if it be commenced before its expiration, they may proceed after the year has expired. (*Dent v. Prudence*, M. T. 1730, K. B., 2 Stra. 832). One churchwarden cannot sue in his own name, without joining the other. (*Ward v. Brampton*, T. T. 1693, C. P., 3 Lev. 362; *S. P. Green v. Pope*, M. T. 1696, K. B., 1 Ld. Raym. 127).

By 7 Jac. 1, c. 5, and 21 Jac. 1, c. 12, and 12 Will. 3, c. 11, in actions against churchwardens, they may plead the general issue, and the parishioners may give evidence against them.

A suit in the Ecclesiastical Court lying for a nuisance and injury to a churchyard wall, under a claim of right of way, the Court of equity has jurisdiction to restrain the act by injunction; and where the churchwardens instituting the suit have since gone out of office;—Held, that they might continue it, and, by a supplemental bill, join their successors as co-plaintiffs. (*Marriott v. Tarpley*, 9 Sim., Ch., 279).

Where the defendants, as churchwardens and overseers, in 1813 signed notes for monies borrowed by the parish under order of vestry, and payment of interest had been made within six years by orders of vestry, and entered in the overseers' book of disbursements, and allowed and signed, amongst other parishioners, by one of the defendants;—Held, that such payments took the case out of the statute. (*Crew v. Petit*, E. T. 1834, K. B., 3 Nev. & M. 456; S. C. 1 Ad. & E. 196).

VI. RELATIVE TO THEIR COMPETENCY AS WITNESSES.

Churchwardens being nominal parties on any trial may give evidence.

By 3 & 4 Vict. c. 26, it is enacted, "That no churchwarden, overseer, or other officer, in and for any parish, township, or union, or any person rated or assessed, or liable to be rated or assessed as aforesaid, shall be disabled or prevented from giving evidence on any trial, appeal, or other proceeding, by reason only of his being a party to such trial, appeal, or other proceeding, or of his being liable to costs in respect thereof, when he shall be only a nominal party to such trial, appeal, or other proceeding; and shall be only liable to contribute to such costs in common with the other rate-payers of such parish, township, or union."

Churchyard*. 5 *Peters. Abr.* 458.

Circuit†.

Circuity of Action. See ante, tit. *Action*.

Citation. See tit. *Ecclesiastical Court*.

City. See tit. *Corporation*.

Clandestine Removal. See tit. *Fraudulent Removal*.

Clearing-House. See tits. *Banker—Bills and Notes—Cheque*.

* In a proceeding by the rector against the churchwardens for altering paths through the churchyard and erecting gates without the consent of the rector, a defensive allegation, that it was bona fide done for the convenience of the parishioners, and with their consent in vestry, and with the approval of the rural dean, was rejected, as forming no legal justification. (*Walter v. Montague and Another*, 1 Curt., Cons., 253).

† These are divisions of the kingdom, appointed for the Judges to visit after Hilary and Trinity Terms, for the trial of prisoners and causes. Two of the judges attend every circuit, one presiding in the criminal, and the other in the civil court. Each circuit comprehends several counties: the Home Circuit, Hertford, Essex, Kent, Sussex, and Surrey; the Midland Circuit, Northampton, Rutland, Lincoln, Nottingham, Derby, Leicester, and Warwick; the Norfolk Circuit, Bucks, Bedford, Huntingdon, Cambridge, Norfolk, and Suffolk; the Oxford Circuit, Berks, Oxford, Hereford, Salop, Gloucester, Monmouth, Stafford, and Worcester; the Northern Circuit, York, Durham, Northumberland, Cumberland, Westmoreland, and Lancashire; and the Western Circuit, Southampton, Wilts, Dorset, Devon, Cornwall, Somerset. These circuits are made twice a year, in the respective vacations.

The officers belonging to the different circuits are, the clerk of assise, associate, clerk of arraigns, clerk of indictments, judges, marshal, crier, steward, and tipstaff.

Clergy, benefit of*. 5 *Peters. Abr.* 464.

Clergymen. See *tit. Arrest—Ecclesiastical Persons.*

Clerk. See *tit. Ecclesiastical Persons.*

Clerk of Arraignment†.

Clerk of Assize‡.

Clerk of Nisi Prius§.

Clerk of the Parish. See *tit. Ecclesiastical Persons.*

* By the 7 & 8 Geo. 4, c. 28, s. 6, it is enacted, "that benefit of clergy, with respect to persons convicted of felony, shall be abolished; but that nothing herein contained shall prevent the joinder, in any indictment, of any counts which might have been joined before the passing of this act."

The 7 & 8 Geo. 4, c. 27, repeals so much of the statute 25 Edw. 3, st. 3, c. 6, (vulgo st. 3), as relates to clerks convicted of treasons or felonies, and to the arraignment of clerks; and also so much of the statute 4 Will. & M., c. 24, as explains the statute 3 Will. & M., c. 9; and the whole of the statute 19 Geo. 3, c. 74, except so much thereof as relates to the judges' lodgings; and the whole of the 4 Hen. 7, c. 13; 21 Hen. 3, c. 11; 34 & 35 Hen. 8, c. 14; 3 Will. & M. c. 9; 6 Anne, c. 9. By the 9 Geo. 4, c. 2, s. 33, which, after reciting, "and whereas it is expedient to prevent all doubts respecting the civil rights of persons convicted of felonies not capital, who have undergone the punishment to which they were adjudged," enacts, "That where any offender hath been or shall be convicted of any felony not punishable with death, and hath endured or shall endure the punishment to which such offender hath been or shall be adjudged for the same, the punishment so endured hath and shall have the like effects and consequences as a pardon under the great seal, as to the felony whereof the offender was so convicted: Provided always, that nothing herein contained, nor the enduring of such punishment, shall prevent or mitigate any punishment to which the offender might otherwise be lawfully sentenced on a subsequent conviction for any other felony."

By the 7 Geo. 4, c. 64, s. 7, felonies without benefit of clergy are provided for under all circumstances consequent on the indictment.

† The duty of the clerk of the arraigns consists of three parts: 1st, in calling the prisoner to the bar by his name, and commanding him to hold up his hand; 2nd, reading the indictment to him distinctly in English, that he may understand the charge; and lastly, demanding of him whether he is guilty or not, and asking him how he will be tried. (See 2 Hale, P. C. 219; 4 Hagr. St. Tr. 777).

‡ The clerk of assize writes all judicial proceedings done by the justices of assises on the circuits; (See *Crompt. Jurisd.* 227); and he is interdicted from acting as counsel. (See 33 Hen. 8, c. 24). As to his fees for drawing indictments, see 10 & 11 Will. 3, c. 23, s. 7; and fines for falsely recording appearances of persons returned on a jury; (See 3 Geo. 2, c. 25, s. 3).

A clerk of assize has no lien on the records for his fees. (*Rose v. Bury*, E. T. 1779; K. B., 1 Leach, C. L. 201).

§ This officer is appointed by the *custos brevium* for all counties except Westminster and the city of London; and for the latter places he is nominated by the Chief Justice.

Clerk of the Peace.

(See 5 *Peters. Abr.* 481).

HARDING *v.* POLLOCK, T. T. 1830. C. P. 6 *Bing.* 25; S. C. 1 *D. & C.* 453; S. C. 3 *Bligh, N. S.* 161.

The clerk of the peace for the King's county, in Ireland, cannot be appointed by the Crown.

ON the question as to the right of appointment of the clerk of the peace in the King's county, in Ireland—

The Court held the right of appointment not in the Crown, but in the *custos rotulorum*, reversing the judgment of the Courts of King's Bench and Exchequer Chamber in Ireland. *Diss. Bayley, J.*

HODGSON, *Ex parte*, H. T. 1828. Ex. 2 *F. & J.* 142.

The 4 & 5 Will. & M. is not so far repealed by the 3 Geo. 4, c. 46, s. 14, as relates to the duplicate of fines, &c., being delivered on oath into the Exchequer.

THE clerk of the peace of Cumberland had been amerced for not delivering into the Exchequer Chamber a duplicate of fines, issues, amerciaments, and forfeited recognisances, pursuant to the statute 3 Geo. 4, c. 46, s. 14. On a rule to shew cause why the amercia-ment should not be discharged, upon an affidavit that the duplicate had been duly delivered, but had been returned because it was not sworn; upon which it had been sworn before a justice of the peace for the county of Cumberland, and re-delivered: it was contended that the statute 4 & 5 Will. & M., c. 24, s. 5, which required a return upon oath, had been repealed by the act 3 Geo. 4, c. 46—

Per Cur.—We find that the 3 Geo. 4 does not repeal the clause of the statute 4 & 5 Will. & M., which imposes the oath. Where, then, is the law which can authorize this Court in saying that the oath is no longer required? The oath required by the late act applies only to the roll of fines, &c., which is to be delivered to the sheriff for certain purposes. The sheriff's return is made to the sessions, and by the clerk of the peace transmitted to the Treasury. In addition to this, the clerk of the peace is required to send a copy of the roll into this Court. The oath which he takes before delivering the copy to the sheriff cannot excuse him from swearing to the correctness of the return which he makes to this Court.

Close. See *tits. Ejectment—Trespass.*

Club and Club-houses.

RAGGETT *v.* BISHOP, T. T. 1826. N. P. 2 *C. & P.* 343.

The owner and master of a club-house may sue a member for the house-bills and subscriptions, as long as he continues a subscriber.

IN *assumpsit*, it appeared that the plaintiff was master of a club, and that the defendant became a member in the year 1823, the subscription being ten guineas a year. By the rules of the club, it appeared that the subscription was to be paid every year, and that, if no notice were given by members of their intention to discontinue, they were to be considered as members. By one of these rules, the master was empowered to collect the "house-bills."

Abbott, C. J.—I think that, as the plaintiff is the master of the house, every member must be considered as a debtor to him for his

arrears. The members may take upon them the management of the affairs of the club, but I think they are bound to pay the master; and if so, the defendant is liable in this action, unless he gave notice of his intention to discontinue his subscription.

RAGGETT v. MUSGRAVE, H. T. 1827. N. P. 2 C. & P. 556.

THE defendant had been a member of the club, and all the members on their admission agreed to conform to the rules. It appeared that the whole of the rules of the club were contained in a book kept by the master, which was accessible to all the members, but that the rules were neither posted up nor sent to the members. It was objected that there was no proof that the defendant knew of these rules.

as every member must be aware that is the rule of the club*.

Abbott, C. J.—I am of opinion that every member of a club must be presumed to be acquainted with its rules.

Coals†.

LITTLE v. POOLE, H. T. 1829. K. B. 9 B. & C. 192.

By the act 47 Geo. 3, c. 68, s. 113, certain regulations are made to prevent frauds in the coal trade. Among them, it is directed that,

Before 1 & 2 Will. 4, to have

* The non-joinder of members may be pleaded in abatement. (*Hare v. Munn*, M. T., 1828, N. P., M. & M. 241, n). As to the liability of members for goods &c. supplied, see *Todd v. Emly*, 7 M. & W. 427.

† By 1 & 2 Will. 4, c. 76, s. 43, it is enacted, that “all coals, cinders, and culm, which shall be sold from and out of any ship or vessel in the port of London, or at any place within the cities of London and Westminster, or within the distance of twenty-five miles from the General Post-Office in the city of London, shall be sold by weight, and not by measure;” by s. 48, “and shall be delivered in sacks containing 112 or 224 lbs.,” by s. 39, “unless the buyer desire them to be delivered in bulk.”

By s. 45.—“If any seller or dealer in coals shall knowingly sell one sort of coals for and as a sort which they really are not within the said port of London, or at any place within the cities of London and Westminster, or within the distance of twenty-five miles from the Post-Office aforesaid.” Penalty, 10*l.*, for every ton of coals so sold, and so in proportion for any smaller quantity: “Provided always, that no seller or sellers of, or dealer or dealers in coals, shall be subject to such penalty, for or in respect of any number of tons exceeding twenty-five tons, for the same offence.”

By s. 47.—“With any quantity of coals exceeding 560*lbs.*, delivered from any lighter, &c., or from any wharf, &c., within the cities of London and Westminster, or within the distance of twenty-five miles from the Post-Office aforesaid, the seller shall cause to be delivered to the purchaser thereof, or to his agent or servant, immediately on the arrival of the waggon, &c., in which such coals shall be sent, and before any of such coals shall be unloaded, a ticket in the form given by the statute: And in case any such seller do not cause to be delivered such ticket as aforesaid to the purchaser or his servant, before any part of such coals are unloaded, he shall forfeit any sum not exceeding twenty pounds; and in case the carman, driver of, or other person attending any such waggon, or other carriage, &c., to whom any such ticket shall have been given by or by the orders of the seller, in order to be delivered to the purchaser, shall refuse or neglect to deliver such ticket to the purchaser or his servant, before any part of such coals shall be unloaded, such driver, &c., shall forfeit any sum not exceeding twenty pounds: Provided always, that coals delivered to any seller or dealer in coals, or to any person or persons purchasing the same at the coal-market, may be delivered without any such paper or ticket.”

enabled the
vendor to sue

upon a sale of coals by wharf measure, there shall be two tickets; one a vendor's ticket, the other a meter's ticket. The vendor's

By s. 49.—“Where coals are delivered in any cart, &c., in bulk as aforesaid, the weight of such cart or other carriage, as well as of the coals contained therein, shall be previously ascertained by a weighing machine, fixed for that purpose on the wharf or place from which the coals shall be brought; and the seller's ticket shall in such cases state the weight of the cart or other carriage, as well as the weight of the coals contained therein; and if any sellers or dealers in coals shall carry or deliver to the purchaser or purchasers, by any cart or other carriage, any quantity of coals exceeding 560lbs. in bulk, without having a weighing machine fixed up on his wharf or place, or without having previously ascertained by such weighing machine the weight of the cart, or other carriage, and the weight of the coals contained therein, such seller or dealer shall forfeit any sum not exceeding 50*l*.”

By s. 50.—“The carman or driver of any waggon or other carriage, in which any coals exceeding 560lbs. shall be carried in bulk, for delivery to the purchaser thereof, from any lighter, &c., or wharf, &c., within London and Westminster, or within the distance of twenty-five miles from the Post-Office aforesaid, shall (in case he shall be required so to do by the purchaser or his servant, or other persons acting on his behalf, weigh the waggon or other carriage, with the coals therein, at any public weighing-machine for carts or carriages which may be situate on the road between the place from which the coals shall be brought and the place of delivery, or at any point within the distance of 100 yards from any part of such road; and such carman or driver is also hereby directed (in case he shall be required so to do by the purchaser, or other person as aforesaid), to weigh in like manner the waggon, or other carriage, without the coals, at any public weighing-machine for carts or carriages which may be situate as aforesaid; and if any such carman or driver shall neglect or refuse, when so required, to weigh the waggon or other carriage, either with or without the coals, at any public weighing-machine for carts and carriages which may be situate as aforesaid, he shall forfeit any sum not exceeding ten pounds: Provided always, that no carman or driver shall be compelled to weigh the waggon, &c., without the coals, until after the same shall have been delivered; and that no such carman, &c., shall be obliged to go back to any such weighing-machine, for the purpose of weighing the waggon or other carriage either with or without the coals, after he shall have passed the same.”

By s. 51.—“If in any case, where any coals shall be delivered in bulk to the purchaser as aforesaid, a less quantity shall be delivered than shall be expressed in the ticket to be delivered therewith, the seller shall forfeit any sum not exceeding ten pounds; and if the deficiency shall exceed two hundred and twenty-four pounds, the seller or sellers shall forfeit any sum not exceeding fifty pounds.

By s. 52.—“If any carman or driver of any waggon or other carriage (not belonging to the purchaser), laden with coals for sale, or to be delivered to the purchaser thereof within the limits aforesaid, shall not have placed in, on, or under his waggon or carriage a perfect weighing machine, marked at Guildhall, London, by the proper officer there, he shall forfeit any sum not exceeding ten pounds; and the seller or sellers of, or dealer or dealers in, or carrier or carriers of such coals, shall forfeit any sum not exceeding twenty pounds.”

By s. 54.—“The carman or driver of any waggon or other carriage in which coals shall be carried in sacks for delivery to the purchaser, or within the limits aforesaid, shall weigh, if he shall be required so to do, any one or more of the sacks contained in any such waggon or other carriage, which may be chosen by the purchaser of the said coals, or his servant, or other person acting on his behalf, with the coals therein; and also afterwards to weigh in like manner such sack without any coals therein.”

By s. 55.—“If any carman or driver of any waggon or other carriage, in which coals shall be carried in sacks for delivery to the purchaser thereof, within the limits aforesaid, shall neglect or refuse to weigh by the said machine any such sack or sacks of coals in manner hereinbefore directed, when thereunto required by the purchaser or his servant, or other person; or if any such carman or driver shall drive away, or permit or suffer the said waggon or other carriage to be driven away, without weighing in manner herein directed the said sack or sacks of coals, or shall hinder, obstruct, or otherwise prevent the purchaser of such coals, or his servant, or any other person whomsoever, from examining the said machine, or weighing all or any of the sacks of coals in such his waggon or other carriage, such carman or driver shall forfeit any sum not exceeding twenty pounds, nor less than five pounds.”

ticket is to be signed by the meter, and is to express the quality of coal sent; and the meter is not to sign it until he is satisfied that for coals, the labouring coal-

By s. 56.—“If any purchaser or his servant, or other person acting for him, who shall require any sack of coals to be weighed, shall find the coals therein to be deficient in weight, and shall signify to the carman, or other person attending such waggon or other carriage, his desire to have all the coals contained in such waggon or other carriage, or any part of such coals, weighed or re-weighed in the presence of some constable, or other indifferent and credible person, then and in every such case such carman or driver shall remain at or before the house or other premises of the purchaser with such coals, and the waggon or other carriage, until such coals are weighed; and if any such carman or driver shall drive away, or permit or suffer to be driven away, such waggon or other carriage, before the coals contained therein shall be weighed, without the consent of the purchaser or his servant, or such other person as aforesaid, such carman or driver shall forfeit any sum not exceeding twenty pounds.”

By s. 57.—“Such purchaser shall procure the attendance of some constable, or other indifferent and credible person, to be present at the weighing of such coals; and all the said sacks, both with and without the coals therein, shall accordingly be weighed with the said machine, by the carman or other person attending such waggon or other carriage, in the presence of the purchaser of the said coals or his servant, if he attend, and of such constable or other person; and in case such purchaser or his servant shall not attend, such carman or other person shall proceed in the weighing of such sacks in his absence; and in case such carman or other person shall refuse or neglect to weigh such sacks, or any of them, in manner aforesaid, he shall forfeit and pay for such offence any sum not exceeding ten pounds; and the constable, police-officer, or any other person who may be present, may weigh the said sacks, or any of them, as aforesaid; and in case, upon the weighing of any such sack, it shall happen that any sack or sacks shall not contain either 112 or 224 pounds net of coals, as the case may be,” penalty on the seller not exceeding five pounds.

By s. 58.—“If any seller or dealer in coals shall deliver to the purchaser thereof, within the limits aforesaid, any quantity of coals less than 560lbs., or the quantity of 560lbs., without previously weighing the same; and also, if required by such purchaser or his servant, in the presence of such purchaser or his servant, then and in every such case such seller shall for every such offence forfeit and pay a sum not exceeding five pounds.”

By s. 77.—“All penalties by this act imposed, not exceeding twenty-five pounds, shall be sued for within one calendar month after the offence committed; and such penalties shall be levied and recovered before any justice of the peace for the county, city, or place where the offence shall be committed; and such justice is hereby required, upon information to him made, to grant a summons or warrant to bring before him such offender or offenders; and if on conviction such penalty shall not be forthwith paid, the same shall be levied by distress and sale of the goods of the offender, by warrant under the hand and seal of such justice; and for want of such distress, or in case the penalty shall not be forthwith paid, such justice may commit the offender for any time not exceeding six calendar months unless such penalty, and all reasonable charges attending the recovery thereof, shall be sooner paid; and all such penalties, when recovered, shall be paid into the hands of the overseers of the parish, township, or place where the same shall have been incurred, for the use of the poor of such parish, township, or place.”

By s. 79.—“The justice before whom any such conviction shall take place, if he shall think fit, may order any part, not exceeding one half of such penalties, to be paid to the informer, or other persons assisting in the apprehension of the offender.

By s. 80.—“The justices also may direct all or any part of the reasonable expenses of any constable or other witness, and compensation for time and trouble, to be paid either by the offender or the complainant; and the sum so ordered may be recovered, together with the penalty, or without, in the same manner as any penalty is directed to be recovered by this act.

By s. 81.—“Where any carman or driver shall be convicted of any offence against this act, and the penalty shall not be forthwith paid, the same shall be paid by the seller by whom such carman or driver shall have been employed at the time when such offence was committed, and shall be recovered by such ways and means as are hereinbefore directed with respect to any penalty imposed by this act; provided that such carman or driver shall be liable to repay to such seller the amount of such penalty, and the costs attending the same; and in case

meter must have signed the ticket under the 47 Geo. 3, c. 68, s. 43*, now repealed.

the coal actually sent corresponds in quality with that which is expressed in the ticket.

In an action for goods sold and delivered, it appeared that the vendor's ticket had not been signed by the meter. The defendant's counsel contended, not only that the provisions of the act had not been complied with, but that they had been fraudulently violated. The plaintiff had a verdict, with 1s. damages. A rule to enter a nonsuit having been obtained—

Per Cur.—It is of importance that vendors of coals should be compelled to obey the provisions of an act which was intended to prevent fraud. The act in question requires the delivery to the buyer of two tickets. That which is called the vendor's ticket is to describe the quality of the coals sold and professed to be delivered; and if those which are sent are not of that quality, the meter would (for he ought to) refuse to sign the ticket. We think it is immaterial how the fact was as to the quality of the coals actually sent. The provision was made to prevent fraud; and it would not be giving due effect to the act to inquire whether fraud had been committed in the particular case which is the subject of inquiry. The plaintiff cannot recover.

LOADER v. THOMAS, H. T. 1830. Ex. 3 F. & J. 525.

The two hours given by the 47 Geo. 3, c. 68, to re-measure coals after notice, meant that

By the stat. 47 Geo. 3, c. 68, s. 116, if any purchaser, or his or her servant, shall be dissatisfied with the measure of any coals sent to him, her, or them, and shall signify to the carman his, her, or their desire to have the coals re-measured, then the carman is required to remain at the premises of the purchaser of such coals with

of non-payment thereof upon demand, and oath of the payment thereof, and that the same, and the costs thereof, have not been repaid by such carman or driver, the amount of such penalty and costs shall be recovered in like manner as any penalty is directed to be recovered by this act."

By s. 82.—"Any person so convicted as before-mentioned may appeal to the justices of the peace assembled at the next general quarter sessions for the county, &c., on giving immediate notice of such appeal, and finding sufficient security, to the satisfaction of such justice or justices, for prosecuting the said appeal with effect, and abiding the determination of the court therein; and such justices at sessions shall hear and determine the matter, and may award costs to either party."

By s. 83.—Witnesses may be summoned, and shall attend, under a penalty of twenty-five pounds.

By s. 85.—An action of debt *qui tam* for forfeitures exceeding twenty-five pounds, is given.

By 5 & 6 Will. 4, c. 65, s. 9, it is enacted, "that all coals, slack, culm, and cannel of every description shall be sold by weight, and not by measure; and every person who shall sell coals, slack, culm, or cannel of any description, by measure and not by weight, shall, on conviction, be liable to a penalty not exceeding forty shillings for every such sale."

* An agent on commission, employed to buy coals, who purchases them first on his own account and then at the same rate supplies his employer, was not a vendor within the 47 Geo. 3. (*Bigg v. Megarey*, 2 M. & Rob. 35). Where the vendor of coals himself inserted in the vendor's ticket the description of them, it was not necessary in an action for penalties under the 47 Geo. 3, c. 68, to produce the ship-meter's certificate required by the 55th section of that statute. (*Roeve v. Starey*, T. T. 1829, N. P., 4 C. & P. 17). Under the 47 Geo. 3, sess. 2, c. 68, the penalty of 20l. per chaldron for every chaldron of coals of one sort sold for another was a penalty exceeding 20l., and therefore might be recovered, under section 150, in the superior courts at Westminster. (*Roeve v. Pool*, H. T. 1825, N. P., 1 C. & P. 622). The entry of the contract in the book of the clerk of the coal-market in London, held not to be deemed evidence of the sale under 47 Geo. 3, sess. 2, c. 68, s. 29, unless the buyer was proved aliunde to have signed the contract. (*Brown v. Capel*, 1829, N. P., 1 M. & M. 374).

such coals, and the cart or other carriage, until such coals are re-measured under a penalty of 10*l*. The 117th section enacts, "that such purchaser desiring such coals to be re-measured, shall send or cause to be sent to the vendor of such coals, or to his, her, or their wharf, warehouse, or place of abode, notice in writing that the said coals are to be re-measured, and such purchaser shall also forthwith send notice in writing to any one of the offices of the respective land coal-meters, of his, her, or their desire to have such coals re-measured; and thereupon a principal meter, or one of the labouring meters, (not being the meter under whose inspection the said coals were originally measured), shall, within the space of two hours next after such notice in writing left at the office of any such principal land coal-meters, attend from such office where such notice shall be so left, at the house, lodging, or other premises of such purchaser, as shall be expressed in such notice for the purpose of re-measuring the said coals, and shall accordingly re-measure the same in the presence of the vendor or vendors and purchaser or purchasers of the said coals, or of his, her, or their agent or servant, if they or any of them shall attend to see the same re-measured; and in case such vendor or purchaser, or his, her, or their agent, shall not attend for the purpose of seeing the coals re-measured, then the meter shall proceed in the re-measuring of such coals in his, her, or their absence."

the meter must have left his office within that time.

The Court held, that these two sections must be read together, and that it is sufficient to satisfy the words of the 117th section if the meter leave the office within two hours after the receipt of the notice, and proceed with due diligence to the house of the purchaser, although he does not arrive there within that time.

MILLS v. FUNNELL, E. T. 1824. K. B. 2 B. & C. 899.

By a local act, giving to commissioners certain powers to be exercised for the preservation of the town of B. from the encroachments of the sea, it was enacted, that there should be paid to the commissioners any rate or duty which they should think fit to order, not exceeding the sum of 3*s*. for every chaldron of coal brought or delivered within the limits of the town.

Per Cur.—The principal question in this case is, whether the duty imposed by the act of Parliament attaches in respect of coals brought or delivered within the limits of the town in separate parcels containing a less quantity than a chaldron, but the aggregate amount of which exceeds a chaldron. The 13 Geo. 3, c. 34, had imposed a duty of 6*d*. for every chaldron of coals landed on the beach of the coast of the town. The 50 Geo. 3, c. 38, imposes a duty not exceeding the sum of 3*s*. for every chaldron of coals landed on the beach of the town, or in any other manner, by land carriage or otherwise, brought or delivered within the limits of the town. The words of the enacting clause are satisfied if the duty does not exceed the rate of 3*s*. for every chaldron. It does not make any distinction as to the quantities brought into the town at each time, but the duty is payable in respect of every chaldron of coal brought or delivered within the limits of the town: it seems reasonable that they should be liable to the duty imposed upon all coals brought into the town, whether they be brought into the town in small or large quantities, for otherwise the duty may be evaded and the object of the Legislature defeated.

Where commissioners under a local act of Parliament for improving the harbour of B., had power to impose duty on coals, and did impose 3*s*. per chaldron:—Held, that a less quantity was liable to the duty.

FREND v. BUTTERFIELD, E. T. 1840. Q. B. 11 *Ad. & E.* 338.

A declaration for penalties under 1 & 2 Will. 4, c. 76, ss. 57, 85, for delivering coals short of weight, merely stating "they were delivered at the place" &c., is bad on demurrer.

THE declaration in *qui tam*, on the 1 & 2 Will. 4, c. 76, ss. 57, 85, for delivering coals short of weight, alleged that they were delivered at the place, and not that they were carried from the ship, wharf, &c. in London and Westminster, for delivery within twenty-five miles, &c. On general demurrer—

The Court held, that the declaration must aver that the coals were carried for delivery from a ship, wharf, &c., or place in London and Westminster, or within twenty-five miles of the General Post-Office in London. It was not sufficient to allege that they were sold and delivered at such place.

Codicil. See *tit. Devises and Bequest—Will.*

Cognisance. See *tit. Replevin.*

Cognovit*.

See *tit. Bankrupt—Bills and Notes.*

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* A *cognovit* is a written confession of the cause of action or amount of the debt or damages. This acknowledgment is usually given when the defendant has no available defence to save the expense of executing a writ of inquiry and to stay execution, upon condition that the giver shall be allowed a certain time for the payment of the debt or damages, or of part, or of the whole, of the cause of action. (See 1 Sellon, 373).

I. RELATIVE TO THE TIME WHEN IT MAY BE GIVEN.

KERBEY *v.* JENKINS, E. T. 1832. Ex. 2 *Tyrv.* 499.

RULE to shew cause why judgment and execution should not be set aside on the ground that the cognovit on which the judgment was entered up had been signed before the service of process on the defendant. Cause was shewn on an affidavit, stating that the cognovit was signed three hours after process had been issued; and it was contended, that, in the Exchequer, a judgment entered up upon a cognovit could be set aside on the ground that no process had been actually served on the defendant before he signed the cognovit, nor was at that time even sued out. (*Wade v. Swift*, 8 Price, 513). It was submitted, that the Court of Exchequer had refused to set aside a judgment on a cognovit signed before the service or issuing of process; but it was stated that the Court of Queen's Bench had recently decided (contrary to the old practice), that a cognovit could not be given before declaration—

The Court said, that if the case referred to could be found, the matter might be spoken to again; if not—Rule discharged.

To ground a cognovit, process must be sued out, but need not be served.

MORLEY *v.* HALL, E. T. 1834. B. C. 2 *D. P. C.* 494.

APPLICATION to set aside a judgment signed on a cognovit, on the ground that the cognovit had been given immediately after the arrest, and before declaration, and therefore void; but—

The Court, after consulting the officers, said it had been the constant practice in the Common Pleas to take cognovits before declaration, and consequently the objection could not prevail.

And may be given without declaration.

SHAWDY *v.* COLWELL, E. T. 1840. Ex. 8 *D. P. C.* 373; S. C. 6 *M. & W.* 543.

ON motion to set aside a cognovit, it appeared from the affidavits, that the defendant having been taken in execution under a ca. sa. upon a previous cognovit, and the plaintiff consented to his discharge out of custody upon receiving the cognovit in question for the amount of debt and costs. The cognovit was entitled in the cause, but it did not appear from the affidavits whether or not any writ had issued previously to its being given—

Per Cur.—It is admitted that the cognovit is given for the same debt, but in a different action. If, then, the defendant means to contend that there has been no fresh writ to support it, he ought distinctly to shew that fact, in order to render this cognovit void.

And where a party was in custody and released upon a second cognovit;—Held, that the defendant must shew that there was no new writ to ground it.

II. RELATIVE TO THE STAMP, FORM, AND CONSTRUCTION OF.

(a) AS TO THE STAMP.

MORLEY *v.* HALL, E. T. 1834. B. C. 2 *D. P. C.* 494.

JUDGMENT had been signed on a cognovit. On motion to set it aside, on the ground that the cognovit required a stamp—

A cognovit need not be

stamped*, though time be given by a separate piece of paper.

The Court held that the cognovit did not require a stamp, merely because, at the time of the execution, the plaintiff by a separate piece of paper undertook to give the defendant time.

CLARKE v. JONES, M. T. 1834. Ex. 3 D. P. C. 277.—S. P.

ROSE v. TOMBLINSON, M. T. 1834. K. B. 3 D. P. C. 49.

On motion to set aside a cognovit, on the ground of no stamp, it suffices if it be stamped before cause shewn.

MOTION to set aside a cognovit. The plaintiff had given a cognovit, the condition of which was that no execution should issue, unless default was made in paying 38*l.* 5*s.* 10*d.*, with interest, in three weeks: one objection was, that the cognovit was not stamped.

Parke, B.—The objection to the stamp would be of no avail, as they could get it stamped before cause was shewn.

See *Clothier v. Ess*, 3 M. & Scott, 49.

(b) AS TO THE FORM †.

PREEDY v. LOVELL, H. T. 1836. Ex. 4 D. P. C. 671.

A statement, on a cognovit, that, if there be any error in the account, it shall be rectified,

JUDGMENT was signed upon a cognovit, which contained an agreement, on the part of the plaintiff, that if there was any error in the accounts between them, it was to be rectified; and it was sworn by the defendant's attorney, that he had investigated the accounts and discovered an error. It was now objected, that the affidavit in support of the rule was insufficient—

Parke, B.—The affidavit ought to have shewn that there was an error in the amount; and, therefore, if the objection is persisted in, the rule must be discharged, but without costs, because the merits have not been gone into.

BEST v. GOMPERTZ, H. T. 1834. Ex. 2 C. & M. 427; S. C. 2 D. P. C. 395.

or if the terms of a cognovit be, not to bring error or delay execution, it is binding.

THE defendant, in this action, gave a cognovit, in which he undertook “not to bring a writ of error or delay execution.” He afterwards brought a writ of error, which was allowed; and now, upon his being brought up by habeas corpus from the Fleet Prison, motion was made to charge him in execution: this was offered on the ground that the allowance of a writ of error operated as a super-sedeas. *Stonehouse v. Ramsden*, (1 B. & Ald. 676), was referred to—

Per Cur.—The plaintiff has a right to charge the defendant in execution. The defendant has expressly agreed not to bring a writ

* Unless it contains terms of agreement; (*Ames v. Hill*, 2 B. & P. 150); as to take the debt by instalments. (*Reardon v. Swaby*, 4 East, 188).

† A cognovit given before plea should state the confession, the amount of the debt or damages, the terms upon which the cognovit is given, and the agreement by defendant not to file a bill in equity, nor bring a writ of error; (and 1 Sellon, 372; 1 Tidd, 8th ed. 607); and when given after plea, it should also contain an agreement to withdraw the plea, in which case it is termed a cognovit actionem relicta verificatione, from the form of the entry of it upon the roll. (See 1 Sellon, 372).

By the 3 Geo. 4, c. 39, if any cognovit actionem shall be given, subject to any defeasance or condition, such defeasance or condition shall be written on the same paper or parchment on which such cognovit actionem shall be written, before the time when the same, or a copy thereof, respectively shall be filed, otherwise such cognovit actionem shall be null and void.

of error or delay execution; and it has been frequently decided, that if a writ of error appears to have been brought for delay, or contrary to good faith, it is no supersedeas.

(c) AS TO THE CONSTRUCTION OF.

JONES *v.* REYNOLDS, E. T. 1834. K. B. 3 *N. & M.* 465; S. C. 1 *Ad. & E.* 384.

By the terms of a cognovit no judgment was to be entered up thereupon, or execution issued, until after the final hearing of a Chancery suit instituted by the defendant against the plaintiff, to be relieved from the cognovit on which this action was brought; and it was expressly agreed, that upon such decree or order being made in favour of the plaintiff in this action, the plaintiff should be at liberty to levy upon such execution for such sum or sums of money only as by the said decree or order the defendant should be directed to pay. The decree was made by the Master of the Rolls; but the defendant had appealed to the Lord Chancellor: the plaintiff notwithstanding signed judgment—

Where judgment is not to be entered up upon a cognovit until after a decree in Chancery, an appeal against the decree suspends the proceedings.

The Court held, the plaintiff was not authorized to enter up judgment pending an appeal to the Lord Chancellor; and accordingly set it aside.

DUMMER *v.* PITCHER, E. T. 1833. K. B. 3 *B. & Ad.* 347.

A COGNOVIT was given with a condition for paying £—— within a month after the ultimate decision of certain Chancery suits in the plaintiff's favour; a decree was made by the Vice-Chancellor, and the minutes settled, but the decree had not been passed by the registrar, and the defendant had lodged a caveat, intending to appeal.

So, where the decree had not passed the registrar, and a caveat lodged for an appeal.

The Court held, that the suits were not ultimately decided within the meaning of the condition, and the execution was therefore irregular.

ROSE *v.* TOMBLINSON, M. T. 1834. B. C. 3 *D. P. C.* 49.

ON motion to set aside an execution upon a judgment on a cognovit.—By the terms of the cognovit no judgment was to be signed or execution issued, unless default shall be made in payment of the 25*l.*, together with the aforesaid costs, by instalments of 10*s.* each calendar month. Several of the instalments, due under the cognovit, not having been paid, the plaintiff signed judgment for the whole amount of 25*l.*, and the costs which had accrued. This, it was contended, the plaintiff had a right to do, as, from the language of the cognovit, the defendant must be taken to have agreed, that, in case of his making default in payment of any one instalment, the plaintiff should be at liberty to sign judgment for the whole.

If the terms of a cognovit be, that execution may issue upon default in payment of £—— by instalments, execution may issue for the whole amount, on any default.

Per Littledale, J.—I think the terms of this cognovit do give such authority. Here, default has been made in payment of the sum of 25*l.* by the instalments mentioned in the cognovit. That default has been made if one instalment be not paid, for when that occurs the 25*l.* cannot be paid in the manner stipulated; and if default has been made in payment of one instalment, the defendant has not relieved himself from the condition; and for the non-

performance of which judgment may be signed, and execution may issue. This case very much resembles that of *Loveridge v. Forty and Another*, (1 Mau. & Sel. 706).

TURNER v. PAYNE, E. T. 1834. K. B. 3 N. & M. 354; S. C. 1 Ad. & E. 34.

A cognovit was payable by instalments; a surety agreed to render the principal within seven days after default, upon any instalment not being paid:—Held, that the surety was only bound to render the principal once, and not upon a subsequent default.

A PERSON of the name of Manning, being indebted to the plaintiff, gave a cognovit actionem, which was accepted by the plaintiff, and was to the effect, "that judgment was not to be entered up, unless default be made in payment of 37*l.*, &c., in manner following—that is to say, the sum of 5*l.*, part thereof, on the 15th day of June next, and the like sum of 5*l.* on the 16th day of each succeeding calendar month, until the whole of the said sum of 37*l.* is fully paid and satisfied; but in case default be made in payment of any or either of the said instalments, on the days on which the same are respectively payable, the plaintiff shall immediately be at liberty to enter up judgment for the whole of the said sum of 37*l.*, or so much thereof as shall remain unpaid, and levy the same, together with the costs of entering up judgment, and of the execution to be issued thereupon," &c. The defendant in consideration of this undertook that Manning should personally attend at the office of the plaintiff's attorney within seven days after due notice requiring such attendance. It appeared that, upon the first instalment becoming due, and notice having been given for the attendance of Manning on a particular day, he did not attend at the time mentioned, but that he subsequently came with the present defendant, who paid the first instalment. On the second instalment becoming due, a notice was again given to the defendant, requiring the personal attendance of Manning, in order that he might be taken in execution; Manning did not attend: and after some little time this action was commenced. *Denman*, C. J., thought, that by the personal attendance of Manning, upon the first instalment becoming due, the undertaking of the defendant was discharged; and therefore nonsuited the plaintiff.

Per Cur.—If Manning was produced once, that quite satisfied the defendant's undertaking. The word "any" may mean several, or it may mean one only. If the instalment was not paid in any one day when it became due, the plaintiff was entitled to take Manning in execution for the whole. He could not take him in execution for the 5*l.* due; he must either have taken him in execution for the whole or not at all.

III. RELATIVE TO THE PARTIES TO.

OLIVER v. WOODRUFFE, H. T. 1839. Ex. 7 D. P. C. 166; S. C. 4 M. & W. 650.

An infant cannot bind himself by cognovit.

AN infant gave a cognovit and bound himself to bring no writ of error. On motion to set the execution aside—

Per Cur.—It has been decided, that an infant cannot execute a warrant of attorney. It is a general rule of law, that a minor cannot do anything to prejudice himself or his rights; but in this cognovit there is an express provision to deprive him of the right of bringing a writ of error. Besides, the minor is made to state an

account, and appear by an attorney of the Court, instead of by guardian. Both these acts are in violation of established principles. The infant cannot acknowledge an account stated so as to bind himself; if an action be brought against him, the jury will have to determine the reasonableness of the demand. But, further, this infant is made to appoint an attorney to appear for him in an action to be brought for a certain sum; and supposing that there was no stipulation in this cognovit to deprive him of the benefit of a writ of error, he might hereafter defeat the proceedings by alleging his minority as error in fact.

TURNER *v.* SHAW, M. T. 1833. Ex. 2 D. P. C. 244.

JUDGMENT was signed on a cognovit. On motion to set aside the cognovit, judgment, and all proceedings thereon, it appeared that the defendant gave a cognovit believing himself under duress—

The Court set aside the proceedings, although not in custody, nor any writ in fact issued.

And if a party, under belief that he is under duress, executes a cognovit, it will be set aside.

IV. RELATIVE TO ITS EXECUTION.

(a) UNDER 1 & 2 VICT. c. 110.

MASON *v.* RIDDLE, H. T. 1840. Ex. 8 D. P. C. 207; S. C. 5 M. & W. 513.

THE plaintiff's attorney sent a writ to his agent at Shaftesbury. It was ultimately arranged that the plaintiff should accept a cognovit from the defendant, which was accordingly sent down to Shaftesbury for execution. The agent explained to the defendant the necessity of his nominating some attorney to attest the execution on his behalf, whereupon the defendant said, "I name you;" and the cognovit was executed accordingly. The agent, in his books, charged the defendant for negotiating the matter.

Under 1 & 2 Vict. c. 110*, the attorney to attest a cognovit must be an attorney "other" than that of the plaintiff.

Per Cur.—The Rules E. T., 15 Car. 2; 2 Stra. Rep. 1245; and E. T., 4 Geo. 4; and H. T., 2 Will. 4, were framed requiring the attesting attorney to be expressly named by the defendant. Then came the 1 & 2 Vict. c. 110, which embodies the substance of both Rules, and renders it necessary in all cases that the attorney attest be some other than the plaintiff's attorney, and expressly named by the defendant. The judgment on the cognovit must be set aside.

* By 1 & 2 Vict. c. 110, s. 9,—“And whereas it is expedient that provision should be made for giving every person executing a warrant of attorney to confess judgment, or a cognovit actionem, due information of the nature and effect thereof, it is enacted, That no warrant of attorney to confess judgment in any personal action, or cognovit actionem given by any person, shall be of any force, unless there shall be present some attorney of one of the superior courts on behalf of such person expressly named by him, and attending at his request, to inform him of the nature and effect of such warrant or cognovit before the same is executed, which attorney shall subscribe his name as a witness to the due execution thereof, and thereby declare himself to be attorney for the person executing the same, and state that he subscribes as such attorney.”

BARNES *v.* PENDREY, T. T. 1839. Q. B. 7 D. P. C. 747.

And cannot be named by the clerk of the plaintiff's attorney;

ON motion to set aside a cognovit, it appeared that the clerk of the plaintiff, at the request of the defendant, procured an attorney to act for him, and a request was written by the plaintiff's attorney on the margin of the cognovit—

The Court held, that, under the circumstances, the party not having had an opportunity of exercising his own discretion, the instrument was invalid under 1 & 2 Vict. c. 110, s. 9.

RICE *v.* LINSTED, M. T. 1838. C. P. 7 D. P. C. 153.

as the party acting for the defendant must be quite unconnected with the former.

ON motion to set aside a cognovit under 1 & 2 Vict. c. 110, it appeared that a cognovit had been attested on behalf of the defendant by an attorney who accompanied the plaintiff's son to the defendant's residence, and who subsequently carried the instrument to the Queen's Bench office to be filed, and there subscribed his name upon the back of it as the plaintiff's attorney's agent.

Per Cur.—It appears to us, that a person who goes into the house of the defendant accompanying the plaintiff's son, who is a clerk to the plaintiff's attorney, and who is told beforehand by him, that there will be a cognovit to be executed, is not such an attorney as is intended by the statute. It is meant that the defendant should exercise a free and unrestrained choice in sending for some person who shall act as his attorney on the occasion. Now here, not only is the attorney connected with the son of the plaintiff before the execution of the cognovit, but he appears to be afterwards connected with the instrument, for he is the person who carries it to the Queen's Bench office to be filed, and his name appears upon it. He is not, therefore, so disconnected with the plaintiff's attorney as to satisfy the Court the rule must be made absolute.

PEASE *v.* WELLS, T. T. 1840. B. C. 8 D. P. C. 626.

But if a defendant request an attorney to be sent for, and he be alone with the attorney, who explains the nature of the document, that is sufficient within the statute.

THE defendant had come to the office of the plaintiff's attorney for the purpose of executing the cognovit; he was informed that it would be necessary for him to have an attorney on his behalf present in order to render valid the cognovit he was about to execute. He stated that he had no attorney, and requested the plaintiff's attorney to name one to him. The plaintiff's attorney accordingly mentioned A. B. The defendant requested that A. B. might be sent for: he was sent for and he came. A. B. then went into a private room only accompanied by the defendant; and there told the latter what were the requisites pointed out by the act of Parliament. He then asked the defendant if he wished him to act as the attorney on his behalf in witnessing the cognovit. The defendant said he did; and accordingly A. B. explained the instrument and witnessed it on his behalf. On motion to set the cognovit aside—

Coleridge, J., held the execution good, and refused to interfere.

POOLE *v.* HOBBS, M. T. 1839. Q. B. 8 D. P. C. 113.

The attestation must be that he sub-

A COGNOVIT was attested in these words, "Witness, George Edwards, defendant's attorney, named by him and attending at his request." On motion for setting aside the cognovit, on the ground

that the attestation of it did not comply with the provisions of 1 & 2 Vict. c. 110, s. 9—

Per Coleridge, J.—The attestation is insufficient within the 1 & 2 Vict. c. 110, s. 9. It is as follows: "Witness, George Edwards, defendant's attorney, named by him and attending at his request;" and omits to state also that he subscribes as such attorney. According to the statute the witness must declare that he is the party's attorney, and also state that he subscribes "as such attorney."

scribes as "such attorney" for the defendant.

OLIVER v. WOODRUFFE, H. T. 1839. Ex. 7 D. P. C. 166; S. C. 4 M. & W. 650.

THE attestation was as follows: "Witness, A. B., of &c., attorney, and expressly named for the said William Woodruffe, sued as William Woodruffe, at his request; and I hereby subscribe as and declare myself to be attorney for him, having read over and explained to him the nature and effect of this cognovit previous to his execution thereof." Default having been made, judgment was signed and the defendant was taken on a ca. sa. On motion to set the proceedings aside, it was objected that the attorney should be named by the defendant, whereas the attestation only states that he is attorney for him, and it is consistent with such statement that the attorney was named by the plaintiff or any other person.

But if the attestation states the attorney to be the attorney of the defendant, who has been accepted by the defendant, that is sufficient.

Per Cur.—To constitute an express naming of an attorney within 1 & 2 Vict. c. 110, s. 9, it is not necessary that he should be in the first instance named by the party; a recommendation by another, and an adoption of him by the party, will suffice. Here the attorney was in the first instance named by another, but the defendant goes to him afterwards and evidently accepts him as his attorney for the particular purpose.

(b) UNDER RULE, H. T., 2 WILL. 4.

BAYLEY v. TAYLOR, M. T. 1827. K. B. 8 D. & R. 56.

A DEFENDANT in custody signed a cognovit without the presence of his attorney; the Court refused to set aside judgment and execution thereon on a suggestion that the defendant was not aware at the time of the nature of the instrument which he signed, being of opinion that a cognovit was not within the Rule 15 Car. 2.

In K.B., Rule, 15 Car. 2, did not apply to a cognovit.

By Rule H. T. 2 Will. 4, it is ordered, "That no warrant of attorney to confess judgment, or cognovit actionem, given by any person in custody of a sheriff or other officer upon mesne process shall be of any force, unless there be present some attorney on behalf of such person in custody, expressly named by him and attending at his request, to inform him of the nature and effect of such warrant or cognovit before the same is executed, which attorney shall subscribe his name as a witness to the due execution thereof, and declare himself to be attorney for the defendant, and state that he subscribes as such attorney."

But by Rule H. T., 2 Will. 4, an attorney must be present.

* But in C. P. the Rule was held to extend to cognovits. (*Webb v. Aspinall*, 7 Taunt. 701; 1 Moore, 428; *S. P. Arnold v. Lowe*, 7 Taunt. 703; *Paul v. Cleaver*, 2 Taunt. 360).

The cases under rule H. T., 2 Will. 4, are inserted because questions may arise as to grants given before the passing of the 1 & 2 Vict. ante, p. 103, n.

FISHER *v.* PAPANICHOLAS, M. T. 1833. Ex. 2 C. & M. 215;
2 D. P. C. 251; S. C. 4 Tyrw. 44.

But an attorney for the defendant merely being present will not do; he must subscribe his name as such.

RULE to shew cause why the cognovit given by the defendant when in custody should not be delivered up to be cancelled, on the ground, that Rule 72 of Hilary Term, 2 Will. 4, had not been complied with. It appeared from the affidavits, that before the cognovit was signed the defendant consulted his attorney, who advised him to give a cognovit and likewise perused the instrument; but, as the attorney was not in the way at the time when it was required to be executed, a clerk in plaintiff's attorney's office requested another attorney instead of defendant's attorney to attend; but he refused to describe himself as the defendant's attorney, saying that he did not consider himself as such.

Per Cur.—None of the provisions of the rule have been complied with. It is said that some of them are matters of form only, but we think the whole rule is to be treated as matter of substance, as it gives the prisoner a protection and prescribes essential and useful precautions in the execution of solemn instruments. Here, there is no fraud imputed, but we are to look at the possibility of fraud being committed. The rule requires that the defendant, when he executes the cognovit, shall have present an attorney who can give him competent advice, attending at his request. The question is, therefore, whether the latter words of the rule are satisfied by a parol declaration, that the party is present as the defendant's attorney and acts as such; but, we are of opinion that the subscription here is not enough; hence, it should appear in writing that he subscribes as attorney for such defendant.

WALLACE *v.* BROCKLEY, T. T. 1837. K. B. 5 D. P. C. 695.—S. P.
ROBINSON *v.* BROOKSBANK, M. T. 1835. Ex. 4 D. P. C. 395.

In a subsequent case it was held sufficient for the attorney to declare verbally, he subscribes for the defendant.

THE mode of witnessing the cognovit was: "Witness, R. P. Gales, attorney for the above defendant in custody, at his request." It was sworn that Gales at the time verbally stated himself to have attested as the attorney for the defendant.

Per Coleridge, J.—It has been determined by the full Court of Exchequer in *Wilson v. Price*, 4 D. P. C. 213, that it is a sufficient compliance with the rule, if the attorney who is called in by a defendant in custody to witness a cognovit makes the declaration required by the rule *vivâ voce*. I think, therefore, that as that was a decision of the full Court of Exchequer, I am bound by it. (See *Robinson v. Brooksbank*, 4 D. P. C. 395). The attestation on the face of it, therefore, I think is sufficient.

LEES *v.* FRY, T. T. 1836. Ex. 1 T. & G. 1084.

Or signing "as attorney for such defendant" is sufficient.

THE witness to the defendant's signature described himself as attorney for such defendant.

The Court held that it was a sufficient declaration of his being such attorney, and subscribed as such within 72 Reg. H. T. 4 Will. 4.

FRANCE *v.* CLARKSON, T. T. 1837. K. B. 5 D. P. C. 699.

The Rule H. T., 2 Will. 4, only

ON motion to set aside a cognovit, on the ground, that at the time it was executed the defendant had not the assistance of an

attorney attending on his behalf, contrary to Reg. Gen., II. T., 2 Will. 4, s. 72. It was an action on a judgment, and the defendant while in execution under the ca. sa. gave the cognovit.

Coleridge, J.—It is quite clear that the rule in question only applies to persons in custody on mesne process, and not to persons in custody on final process.

applies to persons in custody on mesne and not final process.

BLIGH v. BREWER, M. T. 1834. Ex. 1 C. M. & R. 651; S. C. 3 D. P. C. 266; S. C. 5 Tyrw. 222.

THE defendant was arrested on the 23rd of July, at the suit of the plaintiff, on a promissory note, and on the day of the arrest went to the office of the plaintiff, who was an attorney at Bodmin. There his own attorney, A. B., came to see him, and, as there was some hesitation as to whether or not the defendant would defend the action, left him, and went out of town. The defendant afterwards agreed to give a cognovit for the debt and costs, and C. D., the plaintiff's clerk, was instructed to prepare one. He did so, but informed the defendant that an attorney must be present on his behalf to attest the execution. It was a matter of dispute whether the defendant at first wished to have A. B. or not; but, as he was not in the way, C. D. said he had just seen E. F., and that he would attend if the defendant had no objection. To which the defendant replied that he did not care much who it was. A. B. went to request the attendance of E. F., and the defendant made no objection. They afterwards proceeded to E. F.'s office, who inquired of the defendant whether he wished him to attest the execution of the cognovit as his attorney, to which the defendant answered in the affirmative, and prevented him from reading over the cognovit, as he stated he had already heard its contents. On the part of the defendant, it was contended, that the rule had not been complied with, as there was no attorney expressly named by him attending on his behalf, since E. F. was never named by him nor requested to attend.

Per Cur.—We may say the rule is complied with, though the defendant should be considered as not having expressly named the attorney. He went to E. F.'s office and subscribed the cognovit; that would not have been enough unless he had adopted the proposal of E. F. to be his attorney. If these be not affirmative words it does not come within the rule. But we think there is a strict compliance therewith if a party is asked whether such a person shall be his attorney, and he says, yes: that is sufficient.

A defendant who states he does not care who the attorney is, and an attorney is then named; whereupon the defendant went, and he told him he wished him to attest a cognovit:—Held, a compliance with Rule H. T., 2 Will. 4.

(c) OF THE SIGNING.

PERRY v. TURNER, M. T. 1831. Ex. 2 C. & J. 89; S. C. 2 Tyrw. 128.

ON motion to set aside the judgment and execution on a cognovit, it appeared that the cognovit was dated 3rd November, by which 5*l.* was to be paid on the 5th, and the residue of the plaintiff's demand at stated periods, the plaintiff being at liberty to sign judgment and issue execution for the whole upon any default. The cognovit was signed by two defendants, W. T. and J. S., on the 3rd, and by the other defendant, J. J., on the 7th. On the 7th, the first instalment was paid to the plaintiff's attorney's clerk, who had no authority to

The signing of a cognovit relates to the date and not the time when signed, therefore judgment may be signed the day it is signed.

receive it, and subsequently on that day judgment was signed. On the 8th notice was given to tax costs on the 9th, which at the request of one of the defendants was postponed till the 10th. On the morning of the 10th the defendant's attorney received a notice to attend the taxation of costs at two o'clock that day; he did not attend, and the costs were taxed in his absence.

The Court held that the judgment was regular; that the execution of J. J. on the 7th related back to the 3rd; that the acceptance of the instalment by the clerk without authority did not waive the default; and *that it was unnecessary under the circumstances to give a full day's notice to tax costs on the 10th.*

V. RELATIVE TO ITS BEING FILED*.

VI. RELATIVE TO THE PAYMENT OF.

ANON., H. T. 1832. B. C. 1 D. P. C. 173.

Where money is to be paid to the plaintiff or his attorney, a tender to the plaintiff on the day it became due is sufficient.

By the terms of the cognovit judgment was to be entered on the 11th of January, if payment was not made on that day. The defendant on that day tendered to the plaintiff in Devonshire the entire sum due, which the latter refused to accept, conceiving it should be paid to his attorney.

Park, J.—The question is, whether the tender to the plaintiff is a good tender; for if it was, the plaintiff's attorney had no right to call upon the defendant to incur the expense of remitting the money to London. By the terms of the cognovit he had a right to pay the money either to the plaintiff or his attorney; and having tendered the money to the plaintiff on the day when it became due, he was not bound to remit it to town. The judgment was therefore irregular, and must be set aside.

VII. RELATIVE TO ITS EFFECT AND OPERATION.

ANON., E. T. 1825. K. B. 6 D. & R. 375.

The terms of a cognovit cannot

ON motion to set aside a judgment on a cognovit, the Court held, that the cognovit could not be contradicted nor varied by affidavit.

* By Rule Trin. Term, it is ordered in the K. B., "that no judgment can be signed upon any cognovit without such cognovit being first produced to the clerk of the dockets, and after taxation of the costs filed with him." By the 3 & 4 Geo. 4, c. 39, s. 3, it is enacted, "that every cognovit actionem given by any defendant in any personal action in case the action in which such cognovit actionem shall be given shall be in the Court of King's Bench a true copy of such cognovit actionem, in case the action wherein the same is given shall be in any other Court, shall, together with an affidavit of the time of the execution thereof, be filed with the said clerk in like manner as warrants of attorney or copies thereof and affidavits within the space of twenty-one days after such cognovit actionem shall have been executed; otherwise such cognovit actionem, and any judgment entered up thereon, and any execution taken out on such judgment, shall be deemed fraudulent and void against the assignees of the person giving such cognovit actionem under a commission of bankrupt issued against him after the expiration of twenty-one days, in like manner as warrants of attorney, and judgments and executions thereon are deemed and taken to be fraudulent and void by that act."

CHARRINGTON *v.* LAING, M. T. 1829. C. P. 6 *Bing.* 242.
S. C. 3 *M. & P.* 587.

IN an action on the case for breaking up a road, the defendant gave the plaintiff a cognovit to confess judgment for 200*l.* with a defeasance that no execution should issue if the defendant within a certain time re-instated the road. The road was not completed within the time, nor in the precise manner stipulated. The plaintiff thereupon issued execution, and levied the 200*l.* and costs.

By the Court.—The inclination of the Court is, that this is only a penalty, and not in the nature of liquidated damages. If the stipulation had been in the form of a bond instead of a judgment, the plaintiff must, under the statute of Will. 3, have assigned breaches. We do not say that a cognovit may not be so worded as to render the sum secured by it liquidated damages; but we think it is not so in the present case. Justice, therefore, requires that it should be referred to the prothonotary to ascertain what damages the plaintiff has sustained.

A cognovit in an action for damages is considered as a penalty, and the Court will direct the Master to see what damage has been sustained.

VIII. RELATIVE TO THE JUDGMENT ON.

WATSON *v.* DOW, E. T. 1837. *Ex.* 5 *D. P. C.* 584; S. C. 2 *M. & W.* 386.

JUDGMENT had been signed upon a cognovit. On motion to set it aside, on the ground that an appearance had not been entered until the third day after judgment signed, it was submitted that the defendant was estopped from objecting to the irregularity, an appearance having been entered *nunc pro tunc*. (*Davis v. Hughes*, 7 *T. R.* 206).

Per Cur.—At the time that case was decided, there was relation to the first day of term: the officer says there is no relation of an appearance. The plaintiff should have taken care not to have signed judgment till after the defendant was in Court.

No judgment can be signed without appearance, which cannot be entered *nunc pro tunc*.

BOOTH *v.* PARKER, M. T. 1837. *Ex.* 6 *D. P. C.* 87; S. C. 3 *M. & W.* 54.

By the terms of a cognovit, no judgment was to be entered up unless default should be made in payment of the debt and interest, together with costs, on the 9th of November; and in case default should be made in payment of the debt and interest, together with costs, on the said 9th of November, the plaintiff was to be at liberty to enter up judgment for the same. On the 10th November, the debt not being paid, the plaintiff signed judgment without having taxed the costs, or made any demand of the debt.

Per Cur.—It is irregular to sign judgment before the costs are taxed, unless the plaintiff means to waive his right to costs; in which case he should give the defendant notice of such intention.

Where no judgment to be signed unless default be made in payment of debt and costs:—Held, that the costs must be taxed, or notice given of waiving them, before judgment could be signed.

BARRETT *v.* PARTINGTON, E. T. 1839. C. P. 7 *D. P. C.* 447; S. C. 5 *Bing. N. S.* 487.

By a cognovit, it was provided that judgment should not be entered up until default should be made in the due payment of the debt (which it was subsequently declared should be paid by instal-

In a subsequent case it was held, judg-

ment may be signed, but execution cannot issue until after taxation.

ments), together with costs, to be taxed by the master, as between attorney and client.

Per Cur.—The moment a default takes place, the plaintiff may enter up judgment. We think that it is clear that, under this agreement, he was entitled to do so; but he must tax the costs before execution can issue.

CALVERT *v.* TOMLIN, T. T. 1828. C. P. 5 *Bing.* 1; S. C. 2 *M. & P.* 1.

A defendant signed a cognovit, and died before time of payment:—Held, under a judgment signed as of the preceding term in his lifetime, execution might issue*.

THE defendant in Hilary Term gave the plaintiff a cognovit, with a defeasance that judgment should not be entered up, or execution issued, until a certain day in vacation. The defendant died before the day named, and judgment was afterwards entered up by the plaintiff as of Hilary Term, and execution issued thereon. On notice on the part of the representatives of the deceased defendant to set aside a judgment and execution—

Per Cur.—It has long since been determined that at common law a judgment has relation back to the first day of the term of which it is signed or entered up; and that, if a defendant die in vacation, judgment may be entered up after his death as of the preceding term. In *Bragner v. Langmead*, (7 T. R. 20), it was held, that a judgment signed in any part of the term, or in the subsequent vacation, relates back to the first day of the term, notwithstanding the death of the defendant before judgment actually signed; and that an execution against the goods of the defendant might be taken out upon a judgment so signed, tested upon the first day of the term.

PREEDY *v.* LOVEL, H. T. 1836. Ex. 1 *T. & G.* 847; S. C. 4 *D. & C.* 671.

On motion to set aside, where the defendant's attorney only makes the affidavit, he must swear he believes the truth of the complaint.

THE affidavit to set aside a judgment on a cognovit was made by the defendant's attorney only, and did not state that he believed the truth of the representation contained in the affidavit.

The Court refused to allow the affidavit to be read, and discharged the rule for setting aside the judgment.

IX. RELATIVE TO COSTS.

CLOTHIER *v.* ESE, M. T. 1833. C. P. 2 *D. & C.* 731; S. C. 3 *M. & Scott*, 216.

It seems that Rule, T. T. 1 Will. 4, does not apply to taxation of costs on cognovit;

THE Court in this case intimated an opinion that Rule, Trinity Term, Will. 4, requiring one day's notice to tax, does not apply to the taxation of costs on a cognovit.

CLARKE *v.* JONES, M. T. 1834. Ex. 3 *D. P. C.* 277.

at all events to where a defendant appears in person.

ON motion to set aside a cognovit, and for the Master to review his taxation, on the ground that no notice to tax had been given—

The Court held, that the Rule, T. T., 1 Will. 4, did not apply to cases where the defendant appeared in person.

* By Rule, H. T. 4 Will. 4, the judgment shall bear date the day it is signed.

X. RELATIVE TO AGREEMENTS TO SUSPEND EXECUTION ON.

NURSE *v.* WILLS, E. T. 1833. K. B. 1 N. & M. 765; S. C. 4 B. & *Ad.* 739, affirmed on Error, 1 *Ad.* & E. 65.

AFTER a cognovit given by L., a third party, to the plaintiffs, (being husband and wife), the declaration stated, that, by an agreement between the plaintiffs and defendant, in consideration that the former should not enter up judgment against L. until a certain day, the defendant would render him on that day, or pay the debt and costs. On motion in arrest of judgment—

The Court held—first, that the cognovit being given to both plaintiffs was an admission of the wife having a joint interest; secondly, that, after verdict, the agreement being stated to have been made with the plaintiffs, the promise must be taken to have been to them; and lastly, that if the agreement with the wife were void, it might be rejected as surplusage, and the count then shewed a sufficient consideration for the promise.

An agreement to suspend proceedings upon a cognovit in consideration that the defendant would render A. B. by a certain day, or pay debt and costs, is good.

Cohabitation. See tits. *Adultery—Bastard—Husband and Wife.*

Co-Heir. See tit. *Heir.*

Collateral Security. See tits. *Canal—Contract—Covenant—Frauds, Statute of—Guarantee—Stamp.*

Collatibe. See tit. *Advowson.*

Colonel. See tits. *Army—Contract.*

Coin and Coinage*.

* The law on this subject may now be considered as embodied in 2 & 3 Will. 4, c. 34.

The principal objects of this act are—first, to consolidate all the laws relating to offences against the coin of the realm; secondly, to reduce all those offences to degrees below treason; thirdly, to abolish the punishment of death for any of those offences; and fourthly, to facilitate the conviction of offenders by amending the law as it stood before the passing of this act. Sect. 1 repeals all the acts relating to offences against the coin of the realm from and after the last day of April, in the year 1832, "except so far as any of the said acts may repeal the whole or any

part of any other acts, or may be in force in any part of his Majesty's dominions out of the United Kingdom, and except as to offences and other matters committed or done before or upon the said last day of April, which shall be dealt with and punished as if this act had not been passed: Provided always, that if any person shall, after the commencement of this act, be convicted of any offence against any of the said acts committed before or upon the said last day of April, and such offence shall have been punishable with death by virtue of any of the said acts, in every such case the person convicted of such offence shall not suffer the punishment of death, but shall, in lieu thereof, be liable, at the discretion of the court, to be transported beyond the seas for life or for any term not less than seven years, or to be imprisoned, with or without hard labour, for any term not exceeding four years." By sect. 2, the act is to come into operation on the first day of May, 1832.

Sect. 3—"That if any person shall falsely make or counterfeit any coin resembling, or apparently intended to resemble or pass for, any of the King's current gold or silver coin, every such offender shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and, being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years; and every such offence shall be deemed to be complete, although the coin so made or counterfeited shall not be in a fit state to be uttered, or the counterfeiting thereof shall not be finished or perfected."

Sect. 4—"That if any person shall gild or silver, or shall, with any wash or materials capable of producing the colour of gold or of silver, wash, colour, or case over any coin whatsoever resembling, or apparently intended to resemble or pass for, any of the King's current gold or silver coin, or if any person shall gild or silver, or shall, with any wash or materials capable of producing the colour of gold or of silver, wash, colour, or case over any piece of silver or copper, or of coarse gold or coarse silver, or of any metal or mixture of metals respectively, being of a fit size and figure to be coined, and with intent that the same shall be coined, into false and counterfeit coin resembling, or apparently intended to resemble or pass for, any of the King's current gold or silver coin; or if any person shall gild, or shall, with any wash or material capable of producing the colour of gold, wash, colour, or case over any of the King's current silver coin, or file or in any manner alter such coin, with intent to make the same resemble or pass for any of the King's current gold coin; or if any person shall gild or silver, or shall, with any wash or materials capable of producing the colour of gold or of silver, wash, colour, or case over any of the King's current copper coin, or file or in any manner alter such coin, with intent to make the same resemble or pass for any of the King's current gold or silver coin; every such offender shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and, being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years."

Sect. 5—"That if any person shall impair, diminish, or lighten any of the King's gold or silver coin, with intent to make the coin so impaired, diminished, or lightened, pass for the King's current gold or silver coin, every such offender shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and, being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for any term not exceeding fourteen years, nor less than seven years, or to be imprisoned for any term not exceeding three years."

Sect. 6—"That if any person shall buy, sell, receive, pay, or put off, or offer to buy, sell, receive, pay, or put off, any false or counterfeit coin resembling, or apparently intended to resemble or pass for, any of the King's current gold or silver coin, at or for a lower rate or value than the same by its denomination imports or was coined or counterfeited for; or if any person shall import into the United Kingdom from beyond the seas any false or counterfeit coin resembling, or apparently intended to resemble or pass for, any of the King's current gold or silver coin, knowing the same to be false or counterfeit; every such offender shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and, being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years."

Sect. 7—"That if any person shall tender, utter, or put off any false or counterfeit coin resembling, or apparently intended to resemble or pass for, any of the

King's current gold or silver coin, knowing the same to be false or counterfeit, every such offender shall, in England and Ireland, be guilty of a misdemeanor, and in Scotland of a crime and offence, and, being convicted thereof, shall be imprisoned for any term not exceeding one year; and if any person shall tender, utter, or put off any false or counterfeit coin resembling, or apparently intended to resemble or pass for, any of the King's current gold or silver coin, knowing the same to be false or counterfeit, and such person shall, at the time of such tendering, uttering, or putting off, have in his possession, besides the false or counterfeit coin so tendered, uttered, or put off, one or more piece or pieces of false or counterfeit coin resembling, or apparently intended to resemble or pass for, any of the King's current gold or silver coin, or shall either on the day of such tendering, uttering, or putting off, or within the space of ten days then next ensuing, tender, utter, or put off any more or other false or counterfeit coin resembling, or apparently intended to resemble or pass for, any of the King's current gold or silver coin, knowing the same to be false or counterfeit, every such offender shall, in England and Ireland, be guilty of a misdemeanor, and in Scotland of a crime and offence, and, being convicted thereof, shall be imprisoned for any term not exceeding two years; and if any person who shall have been convicted of any of the misdemeanors, or crimes and offences, hereinbefore mentioned, shall afterwards commit any of the said misdemeanors, or crimes and offences, such person shall, in England and Ireland, be deemed guilty of felony, and in Scotland of a high crime and offence, and, being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years."

If two utterers of counterfeit coin, with a general community of purpose, go different ways, and utter coin apart from each other, and not near enough to assist each other, their respective utterings are not joint utterings by both. (*R. v. Manners*, 7 C. & P. 801). An indictment stated, that, at the assizes holden at H., on the 3rd of August, 4 Will. 4, "C. P. (the present prisoner), together with one T. P., by the name and description of C. P., late of B., in the county of H., labourer, and T. P., late of the same, labourer, was in due form of law tried and convicted," by a certain jury duly taken, "between our said late Lord the King and the said C. P. and T. P., upon an indictment against them for uttering coin, they having other counterfeit coin in their possession," and thereupon it was considered by the Court there, that the said C. P. should be imprisoned for two years. The record of the conviction of C. P. stated his conviction, and the acquittal of T. P.:—Held, that this was no variance, and that this allegation in the indictment did not import that T. P. was convicted." (*Reg. v. Page*, 9 C. & P. 756). Husband and wife were jointly indicted for a misdemeanor in uttering counterfeit coin:—Held, that the wife was entitled to an acquittal, as it appeared that she uttered the money in the presence of her husband. (*R. v. Price*, 8 C. & P. 19). The giving of a piece of counterfeit money in charity is not an uttering within the statute 2 Will. 4, c. 34, s. 7, although the person may know it to be counterfeit; as in cases of this kind there must be some intention to defraud. (*R. v. Page*, 8 C. & P. 122). An indictment for uttering counterfeit coin, knowing it to be counterfeit, (after a previous conviction), charged that the prisoner did utter a counterfeit half-crown to E. H., "knowing the same to be false and counterfeit:"—Held, that the allegation of the scienter was sufficient, and that the word "knowing" must be taken to apply to the prisoner, and not to E. H., who was the last antecedent; and that the scienter must be taken to apply to the time of uttering, although it was not stated to be "then and there." (*Reg. v. Page*, 9 C. & P. 756). Form of indictment for uttering counterfeit coin after a previous conviction. (*Reg. v. Page*, 9 C. & P. 756). An indictment for knowingly uttering counterfeit coin twice on the same day charged an uttering of a counterfeit half-crown; and that the defendants, on the same day, "one other piece of false and counterfeit (omitting the word 'coin'), resembling, and apparently intended to resemble and pass for, a piece of the Queen's current silver coin called a half-crown, unlawfully, &c., did utter and put off to one S. A., the wife of W. G., knowing the same to be false and counterfeit:"—Held, that the omission of the word "coin" did not render the indictment bad, as the words "false and counterfeit" might be rejected as surplusage, and the indictment would then be, "one other piece resembling, and apparently intended to resemble and pass for, a piece of the Queen's current silver coin, called a half-crown." Held, also, that the allegation of the scienter was sufficient, and that the word "knowing" must be taken to apply to the prisoner, and not to S.

A., the wife of W. G." who was the last antecedent; and that the scienter must be taken to apply to the time of the uttering, although it was not stated to be "then and there." (*Reg. v. Jones*, 9 C. & P. 761).

On an indictment for a joint uttering of counterfeit coin, where both defendants are not present at the time of the uttering, the true question seems to be, whether the one was so near the other as to help the other to get rid of the counterfeit coin? (*Reg. v. Jones*, 9 C. & P. 761).

Sect. 8—"That if any person shall have in his custody or possession three or more pieces of false or counterfeit coin, resembling or apparently intended to resemble or pass for any of the King's current gold or silver coin, knowing the same to be false or counterfeit, and with intent to utter or put off the same, every such offender shall, in England and Ireland, be guilty of a misdemeanor, and in Scotland of a crime and offence; and being convicted thereof, shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding three years; and if any person so convicted shall afterwards commit the like misdemeanor or crime and offence, such person shall, in England and Ireland, be deemed guilty of felony, and in Scotland of a high crime and offence; and being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years."

Sect. 9—"That where any person shall have been convicted of any offence against this act, and shall afterwards be indicted for any offence against this act, committed subsequent to such conviction, a copy of the previous indictment and conviction, purporting to be signed and certified as a true copy, by the clerk of the court or other officer having the custody of the records of the court where the offender was first convicted, or by the deputy of such clerk or officer, shall, upon proof of the identity of the person of the offender, be sufficient evidence of the previous indictment and conviction, without proof of the signature or official character of the person appearing to have signed and certified the same; and for every such copy a fee of six shillings and eight pence, and no more, shall be demanded or taken; and if such clerk, officer, or deputy shall certify or utter as true any false copy of any indictment or conviction for any offence against this act, knowing the same to be false, or if any person other than such clerk, officer, or deputy, shall sign or certify any copy of such indictment or conviction, as such clerk, officer, or deputy, or shall utter any copy thereof with a false or counterfeit signature thereto, knowing the same to be false or counterfeit, every such offender shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence; and being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for any term not exceeding fourteen years, nor less than seven years, or to be imprisoned for any term not exceeding two years."

Sect. 10—"That if any person shall knowingly, and without lawful authority (the proof of which authority shall lie on the party accused) make or mend, or begin or proceed to make or mend, or buy or sell, or shall knowingly and without lawful excuse (the proof of which excuse shall lie on the party accused) have in his custody or possession any puncheon, counter-puncheon, matrix, stamp, die pattern, or mould, in or upon which there shall be made or impressed, or which will make or impress, or which shall be intended to make or impress, the figure, stamp, or apparent resemblance of both or either of the sides of any of the King's current gold or silver coin, or any part or parts of both or either of such sides; or if any person shall, without lawful authority (the proof whereof shall lie on the party accused), make or mend, or begin or proceed to make or mend, or buy or sell, or shall without lawful excuse (the proof whereof shall lie on the party accused) have in his custody or possession any edger, edging-tool, collar, instrument, or engine adapted and intended for the making of coin round the edges with letters, grainings, or other marks or figures apparently resembling those on the edges of any of the King's current gold or silver coin, such person knowing the same to be so adapted and intended as aforesaid; or if any person shall, without lawful authority, to be proved as aforesaid, make or mend, or begin or proceed to make or mend, or buy or sell, or shall, without lawful excuse, to be proved as aforesaid, have in his custody or possession any press for coinage, or any cutting-engine for cutting, by force of a screw, or of any other contrivance, round blanks out of gold, silver, or other metal, such person knowing such press to be a press for coinage, or knowing such engine to have been used, or to be intended to be used, for or in order to the counterfeiting of any of the King's current gold or silver coin; every such offender shall in Eng-

land and Ireland be guilty of felony, and in Scotland of a high crime and offence; and being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years."

To convict a prisoner, under the stat. 2 Will. 4, c. 34, s. 10, of the felony of having in his possession a mould, upon which was impressed the resemblance of the obverse side of a shilling, the jury must be satisfied that, at the time the prisoner had it in his possession, the whole of the obverse side of the shilling was impressed on the mould; a part is not sufficient. (*R. v. Foster*, 7 C. & P. 494). On an indictment of the stat. 2 Will. 4, c. 34, s. 10, for the felony of making a mould "intended to make and impress the figure and apparent resemblance of the obverse side" of a shilling, it is sufficient to prove that the prisoner made the mould and a part of the impression, though he had not completed the entire impression. (*Reg. v. Foster*, 7 C. & P. 495).

Sect. 11—"That if any person shall, without lawful authority, (the proof whereof shall lie upon the party accused), knowingly convey out of any of his Majesty's mints any puncheon, counter-puncheon, matrix, stamp, die pattern, mould, edger, edging-tool, collar, instrument, press, or engine used or employed in or about the coining of coin, or any useful part of any of the several matters aforesaid, or any coin, bullion, metal, or mixture of metals, every such offender shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence; and being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years."

Sect. 12—"That if any person shall falsely make or counterfeit any coin resembling, or apparently intended to resemble or pass for, any of the King's current copper coin, or if any person shall knowingly and without lawful authority, (the proof of which authority shall lie on the party accused), make or mend, or begin or proceed to make or mend, or buy or sell, or shall knowingly and without lawful excuse (the proof of which excuse shall lie on the party accused) have in his custody or possession any instrument, tool, or engine adapted or intended for the counterfeiting any of the King's current copper coin; or if any person shall buy, sell, receive, pay, or put off, or offer to buy, sell, receive, pay, or put off, any false or counterfeit coin resembling, or apparently intended to resemble or pass for, any of the King's current copper coin, at or for a lower rate or value than the same by its denomination imports or was coined or counterfeited for; every such offender shall, in England and Ireland be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof shall be liable at the discretion of the court to be transported beyond the seas for any term not exceeding seven years, or to be imprisoned for any term not exceeding two years; and if any person shall tender, utter, or put off any false or counterfeit coin resembling, or apparently intended to resemble or pass for, any of the King's current copper coin, knowing the same to be false or counterfeit, or shall have in his custody or possession three or more pieces of false or counterfeit coin resembling, or apparently intended to resemble or pass for, any of the King's current copper coin, knowing the same to be false or counterfeit, and with intent to utter or put off the same, every such offender shall, in England and Ireland, be guilty of a misdemeanor, and in Scotland of a crime and offence, and, being convicted thereof, shall be liable to be imprisoned for any term not exceeding one year."

Sect. 13—"That where any gold or silver coin shall be tendered to any person who shall suspect any piece or pieces thereof to be diminished otherwise than by reasonable wearing, or to be counterfeit, it shall be lawful for such person to cut, break, or deface such piece or pieces; and if any piece so cut, broken, or defaced shall appear to be diminished otherwise than by reasonable wearing, or to be counterfeit, the person tendering the same shall bear the loss thereof; but if the same shall be of due weight, and appear to be lawful coin, the person cutting, breaking, or defacing the same is hereby required to receive the same at the rate it was coined for; and if any dispute shall arise, whether the piece so cut, broken, or defaced be diminished in manner aforesaid, or counterfeit, it shall be heard and finally determined in a summary manner by any justice of the peace, who is hereby empowered to examine upon oath as well the parties as any other person, in order to the decision of such dispute; and the tellers at the receipt of his Majesty's exchequer, and their deputies and clerks, and the receivers general of every branch of his Majesty's revenue, are hereby required to cut, break, or deface, or cause to be cut, broken, or defaced, every piece of counterfeit or unlawfully diminished gold or silver coin which shall be tendered to them in payment of any part of his Majesty's revenue."

Sect. 14—"That if any person shall find or discover in any place whatever, or in the possession of any person having the same without lawful excuse, any false or counterfeit coin resembling, or apparently intended to resemble or pass for, any of the King's current gold, silver, or copper coin, or any instrument, tool, or engine whatsoever adapted and intended for the counterfeiting of any such coin, it shall be lawful for the person so finding or discovering, and he is hereby required to seize the same, and to carry the same forthwith before some justice of the peace; and where it shall be proved on the oath of a credible witness before any justice of the peace, that there is reasonable cause to suspect that any person has been concerned in counterfeiting the King's current gold, silver, or copper coin, or has in his custody or possession any such counterfeit coin, or any instrument, tool, or engine whatsoever, adapted and intended for the counterfeiting of any such coin, it shall be lawful for such justice, by warrant under his hand, to cause any place whatsoever belonging to or in the occupation or under the control of such suspected person to be searched, either in the day or in the night, and if any such counterfeit coin, or any such instrument, tool, or engine, shall be found in any place so searched to cause the same to be seized and carried forthwith before the said justice or some other justice of the peace; and wherever any such counterfeit coin, or any such instrument, tool, or engine as aforesaid, shall in any case whatever be seized and carried before a justice of the peace, he shall cause the same to be secured for the purpose of being produced in evidence against any person who may be prosecuted for any offence against this act; and all counterfeit coin, and all instruments, tools, and engines, adapted and intended for the counterfeiting of coin, after they shall have been produced in evidence, or where they shall have been seized, and shall not be required to be produced in evidence, shall forthwith be delivered up to the officers of his Majesty's mint, or to their solicitor, or to any person authorized by them or him to receive the same."

Sect. 15—"That where two or more persons, acting in concert in different counties or jurisdictions, shall commit any offence against this act, all or any of the said offenders may be dealt with, indicted, tried, and punished, and their offence laid and charged to have been committed in any one of the said counties or jurisdictions, in the same manner as if the offence had been actually and wholly committed within such one county and jurisdiction: Provided always, that crimes and offences against this act committed in Scotland shall be proceeded against and tried in Scotland in such manner and form as crimes and offences generally have been heretofore tried in that country."

Sect. 16—"That no person against whom any bill of indictment shall be found at any assizes or sessions of the peace for any misdemeanor against this act, shall be entitled to traverse the same to any subsequent assizes or sessions, but the Court before which the bill of indictment shall be returned as found shall forthwith proceed to try the person against whom the same is found, unless such person or the prosecutor shall shew good cause to be allowed by the Court for the postponement of the trial: Provided always, that the rights and liabilities of persons indicted under this act in Scotland, so far as relates to the postponement or time of trial, shall remain and be dealt with in the same manner as in the cases of all other persons indicted for crime in that country."

Sect. 17—"That where, upon the trial of any person charged with any offence against this act, it shall be necessary to prove that any coin produced in evidence against such person is false or counterfeit, it shall not be necessary to prove the same to be false and counterfeit by the evidence of any moneyer or other officer of his Majesty's mint, but it shall be sufficient to prove the same to be false or counterfeit by the evidence of any other credible witness."

Sect. 18—"That in the case of every felony punishable under this act, every principal in the second degree and every accessory before the fact shall be punishable in the same manner as the principal in the first degree is by this act punishable; and every accessory after the fact to any felony punishable under this act shall, on conviction, be liable to be imprisoned for any term not exceeding two years; and in so far as relates to Scotland, every person who shall become accessory after the fact to any of the offences to which the punishment of transportation is by this act attached, shall, on conviction, be liable to be imprisoned for any term not exceeding two years; the general law of Scotland as to accession, or art and part, being in all other respects to regulate the punishments to be awarded under this act."

Sect. 19—"That where any person shall be convicted of any offence punishable under this act for which imprisonment may be awarded, it shall be lawful for the Court to sentence the offender to be imprisoned, with or without hard labour, in

Colony and Colonial Courts*.

(See tit. *Habeas Corpus*).

BASHAM v. LUMLEY, 1831. N. P. 3 C. & P. 489.

IN an action of trespass—

The Judge said, Although there is nothing in the commission of

A colonial governor must ex-

the common gaol or house of correction, and also to direct that the offender shall be kept in solitary confinement for the whole or any portion or portions of such imprisonment as to the Court in its discretion shall seem meet."

Sect. 20—"That, where any offence punishable under this act shall be committed within the jurisdiction of the Admiralty, the same shall be dealt with, inquired of, tried, and determined in the same manner as any other offence committed within that jurisdiction."

Sect. 21—"That, where 'the King's current gold or silver coin,' or 'the King's current copper coin,' shall be mentioned in any part of this act, the same shall be deemed to include and denote any gold or silver coin, or any copper coin respectively coined in any of his Majesty's mints, and lawfully current in any part of his Majesty's dominions, whether within the united kingdom or otherwise; and that any of the King's current coin which shall have been gilt, silvered, washed, coloured, or cased over, or in any manner altered so as to resemble, or be apparently intended to resemble or pass for, any of the King's current coin of a higher denomination, shall be deemed and taken to be counterfeit coin within the intent and meaning of those parts of this act wherein mention is made of 'false or counterfeit coin resembling or apparently intended to resemble or pass for any of the King's current gold or silver coin;' and that, where the having any matter in the custody or possession of any person is in this act expressed to be an offence, if any person shall have any such matter in his personal custody or possession, or shall knowingly and wilfully have any such matter in any dwelling-house or other building, lodging, apartment, field, or other place, open or inclosed, whether belonging to or occupied by himself or not, and whether such matter shall be so had for his own benefit or use, or for that of another, every such person shall be deemed and taken to have such matter in his custody or possession within the meaning of this act."

Sect. 22—"That all actions and prosecutions to be commenced against any person for any thing done in pursuance of this act shall, in England or Ireland, be laid and tried in the county where the fact was committed, and shall in England, Ireland, or Scotland, be commenced within six calendar months after the fact committed, and not otherwise; and notice in writing of such action, and of the cause thereof, shall be given to the defendant or defender one calendar month at least before the commencement of the action; and in any such action brought in England or Ireland the defendant may plead the general issue, and give this act and the special matter in evidence at any trial to be had thereupon, and in Scotland the defender may insist on all relevant defences; and no plaintiff or pursuer shall recover in any such action if tender of sufficient amends shall have been made before such action brought, or if a sufficient sum of money shall have been paid into Court after such action brought by or on behalf of the defendant or defender; and if in England or Ireland a verdict shall pass for the defendant, or the plaintiff shall become nonsuit, or discontinue any such action after issue joined, or if upon demurrer or otherwise judgment shall be given against the plaintiff, or if in Scotland the verdict shall be for the defender, or if the pursuer shall abandon the action, or the Court shall dismiss it as irrelevant or improperly laid; in every such case the defendant or defender shall recover his full costs as between attorney and client, and have the like remedy for the same as any defendant or defender hath by law in other cases; and though a verdict shall be given for the plaintiff or pursuer in any such action, such plaintiff or pursuer shall not have costs against the defendant or defender, unless the Judge before whom the trial shall be shall certify his approbation of the action and of the verdict thereupon obtained."

* The power of suspending advocates from practice is incidental to the power of admitting them to practice: the council therefore refused to interfere with the order for disbarring a practitioner. (*Antigua Justices, In re*, 1 Knapp, P. C. 267).

ercise his power in the regular legal course.

a colonial governor which particularly relates to the power of the ordinary, yet his general authority as governor embraces it; but in cases where such power is to be exercised, as in compelling churchwardens to deliver up books and to account, he must, in order to justify his acts, proceed by regular citations and process of excommunication, and not by committing the party refusing.

BRYAN *v.* ARTHUR, M. T. 1839. Q. B. 11 *A. & E.* 108.

A colonial governor of a penal colony may, under the 9 Geo. 4, c. 83, s. 9, revoke the assignment of convicts from time to time.

DECLARATION in trespass stated that A., B., and C., being the servants of the plaintiff, were assigned to the plaintiff as such servants by the governor of the colony of Van Diemen's Land, by virtue of an act (stat. 5 Geo. 4, c. 84) for divers terms of service then and still unexpired, and during such time the defendant forcibly took away and removed the said persons, so being such servants, from the house and premises of the plaintiff, and forcibly kept them so removed. Plea, that A., B., and C., being such servants of plaintiff, were offenders assigned to plaintiff in pursuance of the said act of Parliament therein also mentioned, and were no otherwise his servants than under and by virtue of such assignment; that it seeming meet to defendant, as such governor, to revoke the said assignment of the said persons, and to cause them to cease to be the servants of plaintiff, defendant, just before the said time when &c., did revoke, under stat. 9 Geo. 4, c. 83, s. 9, the said assignment of the said offenders, so made in pursuance of the said act of Parliament. On demurrer—

Per Cur.—We are of opinion that the language of sect. 9 of stat. 9 Geo. 4, c. 83, is so clear, that it is impossible for us to enter into any speculation independent of the words as to the meaning of the Legislature. We have not the smallest doubt that the power is expressly given to revoke from time to time; and this has been done. There is nothing in the act which prevents future revocations “from time to time.”

Colour in Pleading. See tits. *Declaration—Pleas—Replication—Rejoinder.*

Combination. See tits. *Conspiracy—Conviction—Master and Servant.*

Commencement of Action. See tits. *Penal Action—Process.*

Commission. See tit. *Principal and Agent.*

Commission of Bankrupt (Abolished). See tit. *Bankrupt.*

Commissioners. See tits. *Affidavit—Bankrupt—Inclosure—Lunatic.*

Commitment.

(See 5 *Peters. Abr.* 554, and tits. *Bankrupt—Bastard—Conviction—Justice of the Peace—Warrant*).

HUTCHINSON v. LOWNDES, E. T. 1832. K. B. 1 N. & M. 674; S. C. 4 B. & Ad. 118.

IN trespass, it appeared that a labourer of the name of Cotterell, engaged under the defendant in making a new canal through Congleton, applied to the defendant, Hall, for a summons against the plaintiff, his master, for non-payment of wages, amounting to 1*l.* 4*s.* 6*d.*; upon which complaint a summons was issued, requiring the plaintiff's appearance on that day before the borough justices. On the same day the plaintiff and Cotterell appeared before the defendants, Lowndes and Hall; when Cotterell having sworn to his having performed his work, and that the sum of 1*l.* 4*s.* 6*d.* was due to him from the plaintiff on account thereof, the defendant, Lowndes, verbally ordered the plaintiff to pay the same immediately, together with 2*s.* 6*d.* for the summons and copy thereof, and service. The plaintiff refused so to do; and on his admission that he did not possess any goods upon which the sum might be levied, he was thereupon (without any previous order in writing for payment, or warrant of distress, and also without any commitment being made out in writing) committed at once, on the verbal order of the defendant Lowndes, to the borough gaol of Congleton, for one calendar month, unless the wages and costs should be sooner paid. Upon that order the plaintiff was taken to the borough gaol by the defendants, Radford and Broad, and remained in prison from the 23rd to the 25th of May, when, on payment of the wages and costs, he was discharged. At the trial before Lord *Lyndhurst*, C. B., the jury found a verdict for the plaintiff.

Per Cur.—The justices might have ordered the plaintiff into custody while a warrant was making out, but that would have required only a few minutes. The statute expressly requires the justice to proceed to commit by his warrant, under his hand and seal; but even if the statute did not so direct, it is laid down in *Hawkins* that a warrant of commitment must be in writing. There was no pretence for sending the man to gaol without a warrant.

* A warrant issued by justices to enforce the payment of a penalty, of which a party had been convicted under the 11 Geo. 4 & 1 Will. 4, c. 64, and 4 & 5 Will. 4, c. 85, if not issued too soon, is not bad because it was dated too soon. (*Newman v. Hardwicke*, 3 N. & Per. 368).

A warrant of commitment under the 11 Geo. 2, c. 19, s. 4, for a fraudulent removal of goods by a tenant, did not state that there had been a complaint in writing to the justices, or that the examination of witnesses was upon oath; but it referred to the order of the justices (for payment of double the value of the goods removed) in which those matters were stated:—Held sufficient, and that the justices were not liable in trespass. (*Coster v. Wilson*, 3 M. & W. 411; *Abr. post*, tit. *Distress*).

The commitment must be in writing, and not by parol; though a justice may detain a party by parol while the commitment is being prepared*;

JOHNSON *v.* REID, H. T. 1840. Ex. 6 M. & W. 124.

and must shew that the party was within the jurisdiction of the justice;

THE plaintiff was committed by the defendant, a magistrate, under the 4 Geo. 4, c. 34, s. 3. The warrant of commitment was in the following form:—"To the constable of M., Surrey, &c. Whereas information and complaint hath been made unto me, one &c., upon the oaths of J. H. & S. M., both of M., in the said county of S., calico printers, that W. J., of M. aforesaid, in the county aforesaid, calico-printer, did, on Wednesday the 8th of May instant, contract with the said S. M. to print certain pieces of woollen cotton goods, and that the said W. J. had adopted such contract, and entered into the service of the said S. M. under such contract; and that the said W. J. hath in his said service been guilty of divers misdemeanors, miscarriages, and ill behaviour towards the said S. M., and particularly with having, on the 9th May instant, refused to perform such contract, and left his said work unfinished, and the service of the said S. M., without his license or consent. And whereas, in pursuance of the statute in that case made and provided, I have duly examined the proofs and allegations of both the said parties, touching the matter of the said complaint, and, upon due consideration had thereof, have adjudged and determined and do hereby adjudge and determine the said complaint to be true." The warrant then commanded the constable to convey the plaintiff to the House of Correction, and deliver him to the keeper thereof, who was ordered to detain him in custody.

The Court held that this was a commitment in execution, and that it was bad, as not shewing that the offence was committed, the contract entered into, or the plaintiff employed or found within the jurisdiction of the magistrate.

WICKES *v.* CLUTTERBUCK, H. T. 1825. C. P. 2 Bing. 483.

but need not be as precise as a conviction*;

A WARRANT of commitment stated that a party was convicted for fishing with a rod and line in a pond or pool of water, the right of fishery therein being the private property of W. C.

The Court held that such warrant was void, and could not be cured by a conviction stating that the party convicted attempted to take and destroy the fish in the said pond or pool, without the consent of W. C., he being the owner of the fishery within the said pond or pool, not being in any park or paddock, &c., but in other enclosed ground, being private property; and *Best, C. J.*, said,—It is not perhaps necessary that the offence should be stated with the same precision in the warrant of commitment as in the conviction; but enough should be stated to shew an authority to imprison; without such a statement the officer cannot arrest.

REX *v.* GOURLAY, H. T. 1828. K. B. 7 B. & C. 669; S. C. 1 M. & R. 619.

and the commitment of a lunatic to the

A WARRANT, stating that A. B. had been discovered and apprehended under circumstances that denoted a derangement of mind, and a purpose of committing some crime, for which, if committed,

* A commitment need not be drawn with the same precision as an indictment. (*Rex v. Remnant*, 2 Leach, C. C. 583; 1 East, P. C. 420; 5 T. R. 109; Nolan, 205).

he would be liable to be indicted, to wit, an assault; and that the said A. B., being brought before the justice, he committed him.

The Court said that the commitment to the House of Correction of a person suspected to be of insane mind, and about to commit an offence for which he would be liable to be indicted under 39 & 40 Geo. 3, c. 49, s. 3, being neither a warrant merely for safe custody, nor yet in execution, ought not therefore to be considered with the same strictness, and held to be sufficiently certain, where it stated, in the language of the act as a positive fact, that the party had been discovered and apprehended under circumstances that denoted a derangement of mind.

House of Correction for safe custody is not to be viewed with the same strictness as other commitments.

REGINA v. LOWDEN, H. T. 1839. Q. B. 7 D. P. C. 538.

THE defendants had been committed by certain justices on a warrant, which charged them with having "begun to pull down and destroy in part a dwelling-house, by destroying the windows and window-frames. It was contended that the warrant was defective, as it stated the defendants to have begun to pull down and destroy "a part" of a dwelling-house; while the 7 & 8 Geo. 4, c. 30, s. 8, pursuant to which the commitment was made, applied only to cases of destroying a house, but not "part" of a house.

Patteson, J.—I think that the warrant of commitment is defective, so far as the first felony is stated, on the ground of the words "in part" being introduced.

But a commitment must not state the injury to be "in part" of a house, &c., attacked at a riot;

EDWARDS, *Ex parte*, M. T. 1828. K. B. 8 D. & R. 115.

A WARRANT of commitment, on the 6 Geo. 4, c. 108, s. 81, of a person (who had been refused to be received on board a ship of war, as unfit for the naval service), until he paid the penalty of 100*l.*—

The Court held good, without shewing that he had been examined by a surgeon, as the ground of the refusal to be received into the service; nor need the commitment shew, in terms, that the party had been "called upon to pay the penalty" before he was committed.

and a commitment for not paying a penalty need not state that the defendant "had been called on to pay."

TATE v. CHAMBERS, E. T. 1834. K. B. 3 N. & M. 523.

IN trespass, it appeared that A., having deposited with B. certain goods as a security, a dispute arises concerning the goods; upon which B. obtains from C., a police magistrate, a summons requiring A.'s appearance on a day named. Upon the appearance before C., B. makes oath to a written information, that he believes the goods to have been illegally pawned or disposed of by A. C. gives a further day to the parties; when, after evidence being gone into, C. commits A. for re-examination, on a charge of suspicion of having unlawfully disposed of the goods of B.

Where a complaint has not been properly brought before a magistrate, he has no right to commit for re-examination.

The Court held that the charge was not sufficiently made, so as to give the magistrate jurisdiction over the matter under the 8th section of the Pawnbrokers' Act (39 & 40 Geo. 3, c. 99).

REX v. ELMY, T. T. 1834. K. B. 3 N. & M. 733; S. C. 1 A. & E. 843.

THE return to a habeas corpus by a gaoler stated that the prisoner was received by him under a warrant of commitment, reciting

To make a substituted com-

mitment good, it must appear to be with the sanction of the justices.

a conviction under the Act for the Prevention of Smuggling (3 & 4 Will. 4, c. 53, which authorizes justices to amend their warrants of commitment); that on a subsequent day some person came to the gaol, took away the warrant, and left in lieu thereof another warrant, dated the same day, under the hands and seals of the same justices, but which contained no statement of its being a substituted warrant; and that under this warrant he had since detained the prisoner.

The Court held that it did not sufficiently appear that the second warrant was substituted by the authority of the justices, and that the prisoner was therefore liable to be discharged.

Committee of Lunatic. See tit. *Lunatic*.

Committitur. See *Prisoner*.

Common*.

(See tits. *Copyhold—Descent—Inclosure—Poor Rates—Tenants in Common—Tithes*).

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II. RELATIVE TO THE RIGHTS AND PRIVILEGES OF THE COMMONER, p. 624.

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(d) REPLICATION, p. 628.

(e) EVIDENCE, p. 629.

(f) QUESTIONS FOR THE JURY, p. 630.

(g) VERDICT, p. 631.

* By 2 & 3 Will. 4, c. 71—"Whereas the expression, 'time immemorial, or time whereof the memory of man runneth not to the contrary,' is now by the law of England in many cases considered to include and denote the whole period of time from the reign of King Richard the First, whereby the title to matters that have been long enjoyed is sometimes defeated by shewing the commencement of such enjoyment, which is in many cases productive of inconvenience and injustice; for remedy thereof it is enacted, that no claim which may be lawfully

I. RELATIVE TO THE RIGHTS AND PRIVILEGES OF THE LORD.

SEFTON, EARL OF, *v.* COURT, T. T. 1826. K. B. 5 B. & C. 917.

THIS was a feigned issue, to try whether the plaintiffs (trustees of the estates of Lord Foley) were entitled to a right of common for sheep, upon a certain common or tract of waste land in Kidderminster, in respect of several freehold lands and tenements in the manor of Kidderminster, to wit, 115 acres of land then or late in the occupation of William Jones, as tenant, &c., called British Farm, and also 144 acres of land, in the occupation of one William Hornblower, &c., called Blackstone Farm. It appeared that both the farms above mentioned, with the exception of a small piece of land belonging to Blackstone Farm, were in the manor of Kidderminster, and that British Common was in the manor of Lower Mitton, that a part of Blackstone Farm was an allotment from Kidderminster Common, which had been inclosed in 1774; that, previous to that inclosure, the tenants of Blackstone Farm had depastured their sheep upon Kidderminster Common, whence they had occasionally strayed upon British Common; that, after the inclosure, the sheep were turned upon British Common, but that the tenant, Hornblower, until within a few years, also held other lands, in respect of which there was a right of common for sheep upon British Common; that, after giving up those other lands, he still continued to turn on sheep, and his successor in Blackstone Farm had done so up to the time of the Inclosure Act. With regard to the Birchin Coppice Farm, it was proved that one part of this also was an allotment from Kidderminster Common, and the residue, Birchin Coppice, had before this inclosure of 1774 been commonable. It was also proved that the tenants of this farm had turned sheep upon British Common, but, in the same manner as those of Blackstone Farm, had held during part of their tenancy other lands which were entitled to right of common. The number of sheep, in both instances, however, was much greater, as the plaintiffs maintained, than the tenants could be entitled to depasture in respect of the right resulting from those additional lands. The Judge, in summing up, recommended the jury, that if they were of opinion the evidence on both sides warranted such a verdict, to find for the plaintiffs as to both the farms, or to make a distinction as to the

It seems the lord of a manor may exercise a right of common on another manor as well as his own if granted to him.

made at the common law, by custom, prescription, or grant, to any right of common, or other profit or benefit to be taken and enjoyed from or upon any land of our sovereign Lord the King, his heirs or successors, or any land being parcel of the duchy of Lancaster or of the duchy of Cornwall, or of any ecclesiastical or lay person, or body corporate, except such matters and things as are herein specially provided for, and except tithes, rent, and services, shall, where such right, profit, or benefit shall have been actually taken and enjoyed by any person claiming right thereto without interruption for the full period of thirty years, be defeated or destroyed by shewing only that such right, profit, or benefit was first taken and enjoyed at any time prior to such period of thirty years, but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated; and when such right, profit, or benefit shall have been so taken and enjoyed &c. as aforesaid for the full period of sixty years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was taken and enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing."

said inclosures since 1774, giving a verdict in favour only of the right of common in respect of lands inclosed before that period. The jury found generally for the right with respect to the two farms.

Per Cur.—The verdict in this case applied to the whole of both the farms, and this rule was confined to the new inclosures. If the plaintiff shall be satisfied with his verdict, as applicable only to the old inclosures, we will discharge the rule. The objections to the verdict, as it relates to the new inclosures, are, an objection of law, and an objection of fact. We think it just possible that, in law, there may be such a right as the one now claimed, viz., as a right of common on two manors.

ARLETT *v.* ELLIS, T. T. 1827. K. B. 7 B. & C. 346.

A custom for the lord to inclose without limit cannot be sustained.

IN trespass by the lord of a manor against a commoner—

The Court held, that a custom for the lord to inclose without limit is bad, as tending to destroy the rights of the commoner altogether, but that a custom to inclose (even as against a common right of turbary), leaving sufficiency of common, was good.

II. RIGHTS AND PRIVILEGES OF THE COMMONER.

JONES *v.* RICHARDS, T. T. 1837. Q. B. 1 N. & P. 747; S. C. 5 Ad. & E. 529.

A commoner's right does not entitle him to depasture others' cattle "taken on tack."*

ON a question of right of common—

The Court held, that where a party is possessed, as appurtenant to a messuage, of the sole right of pasturage for sheep on a common, he has no right to feed there the sheep of others "taken on tack;" therefore, on an issue as to such a right of pasturage the plaintiff, evidence proving his having depastured there, unmolested the sheep of others "taken on tack," though admissible, is not evidence of the right, as it tends to shew an occupation only.

WHITELOCK *v.* HUTCHINSON, 1837. N. P. 2 M. & Rob. 205.

The right of common levant et couchant is limited to the number the common will support.

ON a question arising as to the meaning of the right of common for cattle levant and couchant—

The Judge held these words to mean such number of cattle as the winter eatage of the ancient tenement, together with the hay and other produce obtained from it during the summer is capable of maintaining.

HEATH *v.* ELLIOTT, E. T. 1838. C. P. 4 Bing. N. S. 388; S. C. 6 Scott, 172.

The right of common per

ON an avowry for distraining sheep damage-feasant upon a certain down, the plea in bar alleged a right of common, per cause de vici-

* The 22 Edw. 4, c. 7, held not to apply to woods where rights of common existed; and the 35 Hen. 8, c. 17, s. 8, only to woods in which immemorial rights of common exist; and that the lord could not, therefore, inclose and keep the space where wood had been cut, in severalty, for the period of seven years given by the statute. (*Dibben v. Marquis of Anglesea*, Ex., 4 Tyrw. 926).

nage, which was traversed by the defendant, and issue being joined on the traverse, it appeared, on the trial, that, when the sheep of the plaintiff strayed from his down to the contiguous one of the defendant, it was the custom to drive them back, and also that the down of the latter, on which the sheep were distrained, was the private property of a third party, who leased it to him—

The Court held, that the action was not maintainable, and that the verdict found for the defendant should not be disturbed.

WELLS v. PEARCY, H. T. 1835. C. P. 1 *Bing. N. S.* 556; S. C. 1 *Scott*, 426.

DECLARATION in replevin for taking the plaintiff's cattle upon Bepton common, the defendant avowed for damage-feasant, stating in his avowry, that he (the defendant), before and at the time of passing the Inclosure Act, was entitled, as occupier of a certain cottage and land in Bepton, to a prescriptive right of common of pasture over the locus in quo. The avowry then proceeded to set forth some of the provisions of the 3 Will. 4, for inclosing lands in the parish of Bepton, from which it appeared that the commissioner appointed by the act had authority before the execution of his award, by notice in writing under his hand, to direct "that all the rights of common, in, over, or upon the said common called Bepton Common, should become extinguished; and that, if, after such notice, any of the claimants of pasturage or common rights, or any other person or persons whatsoever, should permit their cattle or sheep to feed or depasture on any of the land on which such rights of common were so extinguished, it should be lawful for any other proprietor or occupier to distrain them in the manner pointed out in the act." The avowry then proceeded to state, that the commissioners did on a certain day give notice under the act, that all the rights of common, in, over, or upon the said common called Bepton Common, should be for ever thereafter extinguished, whereby the same were extinguished accordingly; and that, because the plaintiff, after such rights of common were extinguished, permitted his cattle to feed on Bepton common, the defendant, as occupier of the said cottage and land, distrained them under the power so given by the statute. To this avowry the plaintiff pleaded in bar, that the said place in which, &c., hath always been contiguous and next adjoining to a certain other common, called Woolbedding Common, and had never been separated therefrom by any fence sufficient to prevent cattle feeding on Woolbedding common from erring and escaping into the close in which, &c. On general demurrer—

Per Cur.—We are of opinion, that a private act of Parliament, for the inclosure of a common, and an award by the commissioners

cause de vicinage exists over open downs adjoining the common.

Where a common is allotted among the commoners, who are to inclose*, one who does not inclose, cannot distrain cattle trespassing on the common.

* Freehold tenants of a lordship, having rights of common for their cattle levant and couchant, and common of turbary and estovers, the lord approved parts of the common, and granted them to other persons; the tenants prostrated; upon which actions of trespass were brought against them, and they filed a bill in the nature of a bill of peace against the lord and his grantees, to be quieted in the enjoyment of their commonable rights:—A general demurrer was overruled, the Court considering it no objection to the bill, that each defendant had a right to make a separate defence, provided that right was a general one, and the Court could not, before answer, judge of the nature of the right. (*Powell v. Earl Powis*, M. T. 1826, Ex. Eq., 1 Y. & J. 159).

under that act, that all rights of common shall be extinguished, does not render the cattle damage-feasant of commoners per cause de vicinage liable to be distrained, unless the locus in quo has been completely fenced, or such commoners have had express notice of the extinguishment.

III. RELATIVE TO WHAT RIGHT OF COMMON PASSES WITH THE LAND.

ATTORNEY-GENERAL *v.* GAUNTLETT, H. T. 1829. Ex. 3 Y.
& J. 93.

A right of common in a royal forest under statute does not pass with the land.

THE statute 52 Geo. 3, c. 71, for the better cultivation of navy timber in the forest of Woolmer, in the county of Southampton, (s. 8) enacts, "for the regulating and securing to the several persons now having right of common of pasture in and over the said forest, the power of cutting peat and turves within such parts of the said forest as shall not be inclosed by virtue of this act, that, after the inclosure shall be made and completed, it shall be lawful for all persons having right of common in the said forest to cut and take peat and turves in any part of the said forest not inclosed under this act, without payment of any fee or sum of money to any keeper, or other person having the care or superintendence of the said forest, for taking the same."

The Court held, that the previous existing rights continued, but the act conferred no new right: it authorized those only who before had the right of estovers and common of pasture to cut without payment of fees for the necessity of the dwelling-house, in respect of which the original right existed; and, therefore, the right of common did not pass with the land.

IV. RELATIVE TO ACTIONS CONNECTED WITH COMMONS.

(a) WHO MAY SUE*.

(b) DECLARATION.

DORRIDGE *v.* CARPENTER, M. T. 1817. K. B. 6 M. & S. 47.

Declaration, stating a right of common as a leaseholder, is not disproved if the plaintiff also holds the lands in fee.

IN case, for disturbance of common "for all plaintiff's cattle leuant and conchant," which he supported by a lease of premises, with "reasonable common of pasture;" and defendant afterwards shewed a conveyance in fee to the plaintiff of the same premises, "with all common, &c., thereunto belonging, or in anywise appertaining"—

The Court held, that the latter constituted only a grant de novo of the former easements, and did not disprove the declaration.

* Overseers who inclose common-lands for the use of the poor may maintain trespass, though the inclosure was without the consent of the lord, according to 1 & 2 Will. 4, c. 42, s. 2. (*Mayson v. Cook*, 1837, C. P., 4 Bing. N. S. 372; *Abr. post*, tit. *Overseer*).

(c) PLEAS.

PEARCE v. LODGE, T. T. 1831. C. P. 12 Moore, 50.

IN trespass, for taking and carrying away furze, the defendant pleaded the general issue—

The Court held, that persons who had a right of common were competent witnesses for him, to prove that he was entitled to the exclusive possession of the land from which the furze was taken.

Sed vide Heath v. Milward, 2 Bing. 429; S. C. 2 Scott, 160; and also 7 C. & P. 501; 5 Ad. & E. 221.

Trespass for taking furze. Under the plea of not guilty, the defendant may shew an exclusive right of possession*.

JONES v. PRICE, M. T. 1836. C. P. 3 Bing. N. S. 52; S. C. 3 Scott, 376.

TO an action of trespass, the defendant pleaded enjoyment of common-right for thirty years before the commencement of the suit.

The Court held the plea sufficient, although it did not allege next before &c., the 2 & 3 Will. 4, c. 71, s. 4, being nothing more than an exposition of proof requisite to support the right.

Plea of enjoyment of common for thirty years "before the commencement of the suit" is sufficient, without the word "next."

ARLETT v. ELLIS, T. T. 1829. K. B. 9 B. & C. 671.

IN trespass, for breaking defendant's close, destroying hedges, &c., pleas, inter alia, claiming a right of common of pasture, by a custom within the manor, that every customary tenant of an ancient customary tenement of a messuage and land whereof the defendant was seised should have common of pasture, upon which issue was taken; a like issue was taken upon a custom stated in another plea, as to a right of turbary. It appeared that the defendant, being such customary tenant of such premises as in the plea stated, in 1812 built a new dwelling-house on part of the premises, which he afterwards occupied, the old house remaining unoccupied until 1825, when, having fallen into great decay, it was pulled down; and that during the interval, whilst the tenant occupied the old, and afterwards when he occupied the new house, he continued to exercise the same customary rights.

To trespass for entering plaintiff's close and destroying hedges, &c., the defendant may plead a right of common by custom.

The Court held, that the defendant was entitled to have the issue joined upon the right of common of pasture found for him in respect of an ancient customary tenement:—held, also, that, to a new assignment alleging the breaking down more of the fences than was necessary for the convenient ingress and egress of men and commonable cattle, and plea of not guilty thereto, it appearing that the defendant did so, really intending to assert and preserve the rights of common, although not about to exercise them, he was also entitled to have the issue upon the plea of not guilty to the new assignment found for him.

* If a commoner, who consents to an encroachment by another commoner, brings an action, the latter may plead leave and license; aliter, where the commoner merely expresses no dissent. (*Harvey v. Reynolds*, 1823, N. P., 1 C. & P. 141). Where, in trespass, upon a plea of leave and license, it appeared that the plaintiff (when under age) had suffered the defendant to erect buildings on the common without objection, and had afterwards, when of full age, upon discovering an additional encroachment, required an increase of rent, or annual acknowledgment:—Held, that the plea was supported. (*Harvey v. Reynolds*, Ex., 12 Price, 724).

ELLIOTT *v.* HARDY, E. T. 1825. C. P. 3 *Bing.* 61.

To an avowry claiming a right of common by a free burgess under a corporate grant, a plea, "that the corporation had been accustomed to appoint a reasonable and proper number of herds," is good after verdict.

IN an action of replevin for taking the plaintiff's cattle, the defendant avowed, under a grant of common of pasture from D. V. to the burgesses of a borough, for each of the burgesses inhabiting therein; and the plaintiff pleaded, in bar, that the corporation had a prescriptive right to appoint a reasonable number of herds for taking care of the cattle put on the common, and a like right of appointing, as a remuneration to each herd, a reasonable number of stints of each such herd to be depastured on such common, and then prescribed for common of pasture of such stints. After verdict, it was objected that the number of herds or stints ought to have been set out with certainty on the face of the plea, and that the custom was invalid, and could not be supported by such a grant.

Per Cur.—The first question is, whether the right of the herds has been alleged with sufficient certainty in the plaintiff's plea in bar. It is unnecessary to decide that point as if it had come before us on special demurrer, as the objection was not raised till after verdict. The issues might have been taken on the prescription; and although the question was not raised for the jury to determine what was a reasonable number of herds or stints, yet it has not been admitted, on the face of the pleadings, as if it had been submitted to them; and it appears to us that it has been set out with sufficient certainty. The reasonableness of the number of herds must depend on the number of cattle the common can bear in any one year; and the grant to the corporation was, that they should appoint a reasonable number of herds and stints to be depastured on the common, for the care or trouble of such herds in guarding the cattle so depastured. It appears, therefore, as far as regards the first question, that the allegation as to the right of the herds has been alleged with sufficient certainty; but the second pleading question is, whether the custom itself is a valid custom; we think it is not.

(d) REPLICATION.

ROGERS *v.* WYNNE, M. T. 1825. K. B. 7 *D. & R.* 521.

Replication, that the common was inclosed with consent of the owner in fee, must shew sufficient common was left.

TRESPASS, for breaking and entering the plaintiff's close, and, with sheep, spoiling and consuming the herbage. The defendants justified under a right of common for sheep, the locus in quo being part of the common. Replication. That the locus in quo had been inclosed, divided, and separated from the residue of the common, with the approbation of the owner in fee. Special demurrer. That the replication did not state that sufficient common was left after the inclosure.

Per Cur.—The insufficiency of common left is to be presumed by the plea; that states that the inclosure, no matter by whom, prevented the full enjoyment of the common. If the plaintiff rely upon the inclosure, it is for him to state that enough was left after the inclosure. The cases in Willes, and in the Institutes, are clearly in point. *Greenhaw v. Isley and Others*, (1 Willes 619); and 2nd Institute, 88.

BOWEN *v.* JENKINS, T. T. 1837. Q. B. 2 N. & P. 87; S. C. 6 A. & E. 911.

IN case, for disturbing plaintiff's right of common—plea, justifying as for defendant's own commonable cattle; replication, that all were not the defendant's cattle levant and couchant.

A surcharge must be newly assigned.

The Court held, that, the action being in substance for surcharging, it ought to have been newly assigned, and that the judge properly rejected evidence respecting it.

(e) EVIDENCE.

MAXWELL *v.* MARTIN, E. T. 1830. C. P. 6 Bing. 522; S. C. 4 M. & P. 491.

IN trespass, for breaking and entering a close called the Lord's Legs, the defendant pleaded that the Lord's Legs was part of B. common, and that he had a right to dig stone upon the waste and uninclosed parts of the common, and upon the Lord's Legs as part and parcel thereof. The plaintiff in his replication protesting that the Lord's Legs was not part of the waste of B. common, traversed the right claimed in the Lord's Legs. At the trial, the defendant admitted that he had no exercise of a right to take stone in the Lord's Legs; and the plaintiff admitted the defendant's right over the whole of B. common, with the exception of the Lord's Legs.

If issue be taken on the plea of right of common, the defendant must establish it.

The Court held that, upon these pleadings, the affirmative of the issue was upon the defendant; and therefore, that the plaintiff was entitled to judgment.

WELCOME *v.* UPTON, T. T. 1839. Ex. 7 D. P. C. 475; S. C. 5 M. & W. 398; S. C. 6 M. & W. 536.

TRESPASS. The defendant, in his first plea, justified under a demise from Billingsley, the lord of a manor, and claimed the sole and several pasturage in the locus in quo, as appurtenant to the manor. The second plea was as follows: that before and at the said several days and times when &c., in the declaration mentioned, Billingsley, and all his ancestors, whose heir he is, from time whereof the memory of man is not to the contrary, have had, and have been used and accustomed to have, and of right ought to have had, and the said Billingsley still of right ought to have, for himself and themselves, the sole and several herbage and pasturage of, and in divers, to wit, 217 a., 2 r., and 3 p. of the said open field, called Port and Girtton Field, in the said declaration mentioned, in gross, for all manner of his and their cattle to feed and depasture thereon from the 4th of September in each and every year respectively; and that before the said several days and times when &c., to wit, on the 1st of March, 1836, the said Billingsley demised to him, the defendant, a certain other messuage, land, and premises, with the appurtenances, situate and being in the parish of Oving aforesaid, in the county aforesaid, to hold the same to him, defendant, as tenant thereof to the said Billingsley, thenceforth from year to year, for so long a time as they should respectively please. At the trial, the defendant gave in evidence a conveyance of the right of pasturage, dated 1755, from one Brereton to Samuel Billingsley, an ancestor of Billingsley in the plea mentioned, and also several mesue conveyances, proving Mr. Billings-

A plea of immemorial right of common, commencing before time of legal memory, is not supported by proof of a grant in 1755.

ley's title. Several leases were also produced, under which the different parties had let the pasturage; and the rents received for the same were shewn by the steward's accounts. It was objected, on the part of the plaintiff, that there was no proof of the ancestral right to be enjoyed by Mr. Billingsley and his ancestors for his and their cattle to feed and depasture thereon; and that such personal right could not be assigned, but must be used by Mr. Billingsley alone.

Per Cur.—Whether or no this was a claim to a profit à prendre, and even admitting that sect. 5 of the Prescription Act did not include such a profit, when neither appendant nor appurtenant, yet the evidence disproved the immemorial right as pleaded; and sect. 1 of that statute did not cure the variance. The proper course, in such cases, would be to plead the enjoyment of the right for the period therein mentioned, as might be applicable to the case.

TAPLEY *v.* WAINWRIGHT, M. T. 1833. K. B. 2 N. & M. 697;
S. C. 5 B. & Ad. 395.

Trespass. Plea, right of common. Replication, that the close had been inclosed :—
Held, that proving that the part trespassed on had been inclosed was sufficient.

DECLARATION for trespasses in Whiteacre. Plea, that Whiteacre is part of a waste called Dale, over which the defendant had common appurtenant by prescription. Replication, that Whiteacre had been inclosed and severed from the waste, and held adversely to the commoners for twenty years. It appeared that the alleged acts of trespass had been committed over the whole surface of a close, by destroying the crops growing thereon. Of this close nine-tenths had been inclosed from the commons, and held adversely as against the commoners for more than twenty years. The residue had been inclosed for a shorter period. A verdict was found for the plaintiff.

Per Cur.—The question on these pleadings is, whether, in order to maintain this issue, the plaintiff must prove that every part of the close had been separated and divided for that time. We are of opinion that he need not. Therefore it is clear that, upon the issue in this case, the plaintiff need not have proved that more than the parts actually trespassed upon, (and which the defendant must be understood to have known when he pleaded to them), were inclosed twenty years.

(f) QUESTIONS FOR THE JURY.

ARLETT *v.* ELLIS, T. T. 1827. K. B. 7 B. & C. 346.

The extent of the right to approve is a question for the jury.

TRESPASS. Plea, that the plaintiff's close was parcel of a manor; and that the defendant was seised of a customary tenement of the said manor; and that he was entitled by custom, in right of such tenement, to common of pasture upon the plaintiff's close; and issue taken upon such custom. The plaintiff also new assigned. The defendant entered for other purposes.

The Court held, that upon the first issue the plaintiffs might shew a custom for the lord to inclose parcels of the waste, and that his close had been inclosed by the lord, and granted to him, as shewing that the right of common no longer existed, without pleading the latter custom specially; but as such right to approve depended upon the question of a sufficiency having been left at the time for

all the persons having right of common, that question ought to have been submitted to the jury; and that not having been done, a new trial was granted.

MANIFOLD v. PENNINGTON, E. T. 1825. K. B. 4 B. & C. 161.

DECLARATION stated that the plaintiff was possessed of a messuage and 200 acres of land, with the appurtenances, in the parish of Budworth, in the county of Chester; and by reason thereof was entitled to common of pasture for all his commonable cattle, levant or couchant; and that the defendant disturbed him in the exercise of this right, by turning on cattle. The plaintiff proved that he was a freeholder in the parish of Budworth, and had been always accustomed to turn on to the common mentioned all the commonable cattle he had, viz. horses, cows, and calves, but that he never kept any sheep; but that other freeholders in Budworth who had sheep put them on the common. The learned Judges thought that this evidence did not establish the right as laid, and nonsuited the plaintiff.

Whether the right of common claimed be proved, is a question for the jury.

Per Cur.—**Ballard v. Dyson**, (1 Taunt. Rep. 279), shews that it was for the jury to consider whether the extent of the right of common claimed was made out by the user proved. There must be a new trial.

(g) VERDICT.

TAPLEY v. WAINWRIGHT, M. T. 1833. 2 N. & M. 697; S. C. 5 B. & Ad. 395.

DECLARATION for trespasses in Whiteacre. Plea, that Whiteacre is part of a waste called Dale, over which the defendant had common appurtenant by prescription. Replication, that Whiteacre had been inclosed and severed from the waste, and held adversely to the commoners for twenty years. It appeared that the alleged acts of trespass had been committed over the whole surface of a close, by destroying the crops growing thereon. Of this close nine-tenths had been inclosed from the common, and held adversely as against the commoners for more than twenty years; the residue had been inclosed for a shorter period. A verdict was found for the plaintiff.

In trespass, on a question of common, the verdict may be for the plaintiff as to part of the close, and for the defendant as to part.

Per Cur.—The question on these pleadings is, whether, in order to maintain this issue, the plaintiff must prove that every part of the close had been separated and divided for that time. We are of opinion that he need not. No doubt that the parties will agree to apportion the damage found for trespasses upon the whole space, and to reduce the amount, so as to be a fair compensation for the trespasses to the part inclosed for twenty years. This will avoid the necessity of a new trial. If the defendant requires it, the verdict will be entered for the plaintiff as to part, and the defendant as to the other part of the close in which &c.; and if our judgment be wrong, the objection will be on the record.

Common Bail (Abolished). See ante, tits. *Arrest—Bail*.

Common Council. See tit. *Corporation*.

Common Counts.*See tits.*

<i>Annuity,</i>	<i>Guarantee,</i>
<i>Arbitration,</i>	<i>Insurance,</i>
<i>Bankrupt,</i>	<i>Money Lent,</i>
<i>Bills and Notes,</i>	<i>Money paid,</i>
<i>Charter-Party,</i>	<i>Money had and received,</i>
<i>Composition with Creditors,</i>	<i>Party-Wall,</i>
<i>Contract,</i>	<i>School and Schoolmaster,</i>
<i>Contribution,</i>	<i>Tolls,</i>
<i>Covenant,</i>	<i>Wager,</i>
<i>Declaration,</i>	<i>Warranty,</i>
<i>Frauds, Statute of,</i>	<i>Work & Labour.</i>
<i>Goods sold and delivered,</i>	

Common Informer. *See tits. Informer—Penal Action—Qui Tam Actions.*

Common Pleas. *See tit. Courts.*

Common Pleas of Lancaster. *See tit. Courts.*

Commons, House of.*(See tits. Bribery—Election—Parliament).*

STOCKDALE v. HANSARD, M. T. 1839. Q. B. 9 *Ad. & E.* 1; S. C. 2 *P. & D.* 1; S. C. 8 *D. P. C.* 148.

The Queen's Bench decided that the House of Commons have no right to authorize the publication and sale of a libel contained in a report.

To an action on the case on a libel—plea, justifying the publication as privileged under an order of the House of Commons for printing by the defendants, the printers to the House, and a resolution for selling the same to the public. On demurrer—

The Court held, that it was competent to the Court to inquire as to the existence and legality of such privilege, and that such power to order the publication of papers containing defamatory matters did not exist in the House of Commons.

STOCKDALE v. HANSARD, E. T. 1840. Q. B. 8 *D. P. C.* 522; S. C. 3 *P. & D.* 330.

And where an action was brought for such libel the sheriff under an execution cannot return that he was ordered to retain the

THE sheriff returned to a writ of venditioni exponas, that he had caused the goods to be sold and had the money to render. The sheriff having been summoned to shew cause why he should not pay over the money, *Patteson, J.*, refused to make the order upon him at chambers. The writ was returned on the 19th of December. On the first day of the following term, January 11th, a rule was obtained calling on the sheriff to shew cause why he should not pay the money to the plaintiff or his attorney. He shewed by way of

causes against the application, first, that on the 15th of January, he had been served with the copy of an order of the Insolvent Debtors' Court, (made under 1 & 2 Vict. c. 110, s. 89), requiring him to shew cause why the money should not be paid to the provisional assignee of the estate of the plaintiff, who was an insolvent; secondly, that certain resolutions were passed on the 21st of January by the House of Commons, to the effect, that the money had been levied in contempt of the privileges of the House; that the sheriff be ordered to refund it to the defendants; and that the sheriff having been guilty of a contempt and breach of privilege, be committed to the custody of the serjeant-at-arms.

money levied
by the House
of Commons.

The Court held, that neither cause was sufficient.—Rule absolute.

A rule having been subsequently obtained for an attachment against the sheriff for not paying over the debt and costs pursuant to the above rule and the Master's allocatur—

If he does not
pay it over an
attachment lies.

The Court held, that neither the order of the Insolvent Debtors' Court, nor the resolution of the House of Commons as stated above, were sufficient causes to prevent the rule from being made absolute.

STOCKDALE *v.* HANSARD, H. T. 1840. Q. B. 11 *Ad. & E.* 297;
S. C. 3 *P. & D.* 330; S. C. 8 *D. P. C.* 669.

THIS was an action for a libel contained in a work purporting to be a report of the Inspectors of Prisons for the home department. The action was commenced by a writ of summons, dated the 13th of February; the declaration on the 9th of March, and interlocutory judgment signed on the 18th of the same month. The return was enlarged until the fourth day of this term. On the 25th March the attorney for the defendants attended before Mr. Justice *Williams* at chambers, with the following certificate of the Speaker, verified by affidavit, pursuant to 3 Vict. c. 9, s. 1:—

But under
3 Vict. c. 9, the
Speaker's cer-
tificate is a stay
of proceedings.

“In the Queen's Bench, between John Joseph Stockdale, plaintiff, and James Hansard, Luke Graves Hansard, and Luke James Hansard, defendants. I, the Right Honorable Charles Shaw Lefevre, Speaker of the House of Commons, by authority of and pursuant to a statute made and passed during the present year of our sovereign lady Queen Victoria, intituled ‘An Act to give summary protection to persons employed in the publication of Parliamentary papers,’ do hereby certify, that the book and paper respectively mentioned in the declaration in this cause, and therein respectively described as a book of reports of the Inspectors of the Prisons of Great Britain, and a certain printed paper purporting to be a copy of the reply of the Inspectors of Prisons for the home district with regard to the report of the Court of Aldermen, to whom it was referred to consider the first report of the Inspectors of Prisons as far as related to the gaol of Newgate, and being the publications in respect whereof the action, (such action having been commenced by virtue of a writ of summons bearing date the 13th of February last), hath been commenced and prosecuted, were and are the books of reports and paper published by the above named defendants, by vote and under the authority of the House of Commons.

“Given under my hand, in pursuance of the statute in that case made and provided, this 20th of April, in the year of our Lord 1840. Charles Shaw Lefevre, Speaker of the said House of Commons.”

Notice of this certificate had been given by the defendants to the plaintiff on the 22nd. Mr. Justice *Williams* having declined to stay proceedings on the production of this certificate at chambers, application was made to the Court—

Per Cur.—The act is imperative. The Speaker has certified that this action is in respect of a publication by authority of the House. The rule must be absolute.

Companies. See tit. *Joint-Stock Company*.

Compensation*.

(See tits. *Canal—Corporation—Mandamus—Railway*).

LISTER v. LOBLEY, E. T. 1836. K. B. 6 N. & M. 340.

In a local act, words "owners or proprietors" include a lessee for years;

A LOCAL act, for making a new turnpike road, authorized the trustees to take or pull down the houses, buildings, &c., described, making or tendering satisfaction to the owners or proprietors thereof for the same, or for any loss or damage they might sustain thereby.

The Court held, first, (*Coleridge*, J., dubitante), that a lessee for years was an owner or proprietor within the meaning of this clause; secondly, that the making compensation was not a condition precedent to the trustees' right to take the houses.

REX v. LONDON DOCK COMPANY, T. T. 1836. K. B. 6 N. & M. 390; S. C. 5 A. & E. 162.

but the words "estate and interest" do not extend to mere diminution in business.

A COMPANY were authorized by act of Parliament to make a dock, &c.; to treat for the purchase of houses, buildings, lands, &c.; to clear the ground and sell the materials; and to stop up the streets within a certain boundary, with one exception. By the 89th section it was provided, "that if any person or persons having an estate or interest, not less than a tenancy from year to year, in any houses, lands, or hereditaments, should be injured in his, her, or their said estate or interest, by the making of any such cut &c., every such person should be compensated by the company," &c.

The Court held, that an injury arising to a public house by reason of the works of the company, done under the act, having destroyed the neighbourhood, which occasioned a diminution of custom, and having made the house not so easy of access, on account of thoroughfares being stopped up which before existed, could not be considered an injury to the estate and interest of tenant for life and reversion, so as to entitle the occupant to compensation from the company.

REX v. HUNGERFORD MARKET COMPANY, E. T. 1833. K. B. 4 B. & Ad. 326; S. C. 1 N. & M. 404.

Although a party's interest

BY 11 Geo. 4, c. 70, s. 2, the company was empowered to treat for purchase, and take all or any of the several subsisting leases, or

* Under this title are collected the cases arising upon local statutes and acts, giving to the parties a right to compensation for taking their property, or doing things injurious to them.

agreements for leases, of or in any part or parts of the said premises, and also to purchase the hereditaments mentioned in the first schedule to the act annexed. By sect. 17 it was enacted, that every lessee or tenant for years or at will, mortgagee, and every other person in possession of any messuages, wharfs, lands, or hereditaments, which should be purchased by virtue and for the purpose of the act, should deliver up the possession of such messuages, wharfs, lands, or hereditaments to the directors of the said Hungerford Market Company, or to such person or persons as the directors should appoint to take possession of the same, upon having three calendar months' notice from the directors, or the person or persons so appointed by them, to quit the same at such time or times as should be required by such notice, the directors making such satisfaction or compensation to every such tenant or lessee as aforesaid, (except a mortgagee), in case he or she should be required to quit before the expiration of his, her, or their term in the premises, as to the directors should seem just and reasonable. Notice was given to the tenant that the premises were wanted by the company for the purposes of the act; and it was agreed between the company and the tenant that the latter should hold possession of the house until it was required to be taken down, the notice having previously expired. On motion for a mandamus for compensation, it was contended that the applicant, the tenant, was not entitled to compensation, because his term had expired by the notice to quit—

Sed per Cur.—We must make the rule absolute. There is no distinction between this case and the case of *Ex parte Farlow*, in the matter of the Hungerford Market Company, (2 B. & Adol. 341); the Court decided that the tenant who held from year to year was entitled to compensation.

REGINA v. LONDON AND SOUTHAMPTON RAILWAY COMPANY,
E. T. 1839. Q. B. 10 A. & E. 3; S. C. 2 P. & D. 243.

A RAILWAY company's act required tenants from year to year, (among others), to deliver up possession of their lands, if required by the company, six months after notice, whether such notice was given with reference to the time of the commencement of the tenancy or not, the company compensating the tenant for his unexpired term or interest. A tenant from year to year under a Christmas holding, who, on a reasonable expectation that his landlord would not put an end to the tenancy, had made improvements on his land, received, in January, notice to quit in six months; and at the Michaelmas following possession was demanded by the company. The company then finding that it was not a Michaelmas holding, told the tenant he might retain possession till Christmas. The tenant remained in possession until after that period.

The Court held that, as he had held over after notice, his situation was the same as if a regular landlord's notice had been given, and that he was not entitled to compensation.

REGINA v. HUNGERFORD MARKET COMPANY, M. T. 1838. Q. B.
9 A. & E. 463; S. C. 1 P. & D. 492.

DURING the time the company (Hungerford Market) were treating for premises under the compulsory clause in their act, the claimant

has expired by notice to quit, he is still entitled to compensation under the 11 Geo. 4 (Hungerford Market Bill);

but under the London and Southampton Railway Act, their notice is the same as a landlord's notice; and therefore a tenant holding over is not entitled to compensation.

So, a tenant is not entitled to

compensation for improvements erected during the treaty.

entered into a treaty for renting them of the owner for a year; and if he should hold them beyond the year with the owner's consent, he should quit, or be at liberty to quit, on giving or receiving three months' notice, and leave all improvements for the benefit of the landlord; and he continued in the occupation for several years whilst the treaty with the company was pending; on which being completed, he received three months' notice to quit.

The Court held, that the tenant was not entitled to compensation for improvements made by him during his occupation.

REX *v.* LIVERPOOL AND MANCHESTER RAILWAY, H. T. 1836.
K. B. 6 N. & M. 186; S. C. 4 A. & E. 650.

And in the absence of express words in a statute, the mere expectancy of a renewal of a lease is not sufficient to entitle a party to compensation.

By the 47th section of the Manchester and Liverpool Railway Act (7 Geo. 4, c. 49), a jury were to ascertain and assess the compensation and satisfaction to be made by the said company for any damage &c., sustained by any owner or owners, occupier or occupiers of, or interested in such lands &c., by reason of the making the railway. On motion for a mandamus for compensation, it appeared that the persons on whose behalf this application was made were assignees of the lessee of a term granted by Mr. Bloomfield, who in 1833 had sold and conveyed the premises in question to the company. It appeared, also, that since the year 1816, when the lease was granted, considerable sums of money had been expended upon the premises by those who held the lease, and that Mr. Bloomfield had promised that he would not turn them out at the expiration of the lease; and the premises, from their situation in the centre of the town of Liverpool, from their being very convenient for the carrying on the business of a manufacturer of plaister of Paris, and from the fact of that business having been carried on in them for thirty years, had acquired a considerable local value. The company had given notice that they should require possession of the premises at the expiration of the lease; and it was in order to recover compensation for the right or chance of renewal that the lessees applied for this mandamus.

Per Cur.—The interest, if it is to be called such, is merely a chance of renewal; and it is very difficult to find how the value of such a chance is to be estimated. We thought the words of the Hungerford Market Act sufficiently comprehensive to include an interest like the present; but here are no words which will justify us in coming to the decision that this chance of renewal is an interest for which the parties having it are entitled to compensation under the act.

REX *v.* LEEDS AND SELBY RAILWAY COMPANY, T. T. 1835. K. B.
5 N. & M. 246; S. C. 3 Ad. & E. 683.

Where a railway company are empowered to make compensation, and do make it, further compensation cannot be claimed because a mine has been discovered.

A RAILWAY act empowered the taking lands, making compensation, with an exception of mines, paying the value of the lands, and making compensation for damage sustained by reason of the execution of the works, and for damage, loss, or inconvenience sustained by reason of the execution of any of the powers of the act, such value and compensation to be fixed by agreement or assessed by a jury. Mines to be worked by the owner, so that no damage be thereby done to the railway, and in case of damage the owner to repair it at his own expense, or the company to repair in case of neglect or re-

fusal, and recover the expenses from the owner. The owner of land taken by the company, and for which compensation had been paid, afterwards discovered that a mine to which he was entitled could not be worked without doing damage to the railway; he, therefore, claimed further compensation in respect of the loss sustained thereby—

The Court held, that the owner of a mine, discovered after the lands taken and compensation assessed, and which could not be worked without interfering with the railway, could not sue the company for further compensation for the loss sustained thereby, as such contingent compensation should have been claimed on the original assessment.

REX *v.* NOTTINGHAM OLD WATER-WORKS COMPANY, H. T. 1837.
K. B. 1 N. & P. 480.

A COMPANY created by a local act of Parliament had been commanded by mandamus to summon a jury for the assessment of damages due under the act to a party grieved, and the jury had accordingly assessed the damages at a certain sum. The act provided, that the jury should be summoned before the justices at the quarter sessions, who were to give judgment for the compensation so assessed, and that the verdict and judgment should be registered by the clerk of the peace, and be deemed records for all intents and purposes; and it was also provided, that the costs of the inquisition should be recoverable by distress under a warrant, to be granted by two justices of the peace. No specific mode was pointed out for recovering the amount assessed.

The Court refused to grant a mandamus to the company to pay the costs either of the former mandamus or of the inquisition, as there were remedies for both these cases; but granted a mandamus to them to pay the amount assessed, as it did not appear that there was any other convenient remedy for its recovery.

If no certain remedy be given for a compensation under a statute, a mandamus will be granted.

REGINA *v.* SWANSEA HARBOUR, TRUSTEES OF, H. T. 1837. K. B.
8 *Ad. & E.* 439; S. C. 1 *P. & D.* 512.

By a local act, the trustees of a harbour were empowered to purchase lands, and, in case of disputes as to the compensation, to summon a jury before the justices at sessions, the verdict and judgment to be kept amongst the records of the Court, and, in case of the verdict exceeding or falling short by a certain sum of the amount offered by the trustees, then the costs to be given by the justices, and recovered by a distress warrant—

The Court held, that, on a judgment, the trustees, whose duty it was to institute the proceedings could not object to the preliminary proceedings not being stated in the inquisition, that the fact of the inquiry having taken place sufficiently shewed the fact of dispute, and that the inquisition was not irregular in omitting to state whether the verdict exceeded or equalled the amount offered, and that the local act not prescribing any form, but merely the enrolment of the inquisition, that direction did not make it necessary that they should be drawn up with the formality of other judgments of the Court.

And if, in case of dispute, the compensation is to be decided by a jury before justices, the inquisition need not be drawn up as formally as the judgment.

Comperuit ad diem. See *tit. Bond—Covenant.*

Competency of Witness. See *tit. Witness.*

Composition with Creditors, Deeds of Trust, and Letters of License.

I. COMPOSITION WITH CREDITORS.

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I. COMPOSITION WITH CREDITORS.

- a) OF THE NATURE AND REQUISITES OF THE DEED OR COMPOSITION CONTRACT*.

* The essential requisites to create a valid and binding agreement by creditors with their debtors for the liquidation or temporary discharge of their debts, are—first, that there be a sufficient legal capacity in the parties; secondly, that if the agreement be not under seal, there be an adequate consideration for entering into it, and that in all cases the contract be *bonâ fide*; and thirdly, that the parties assent to the agreement.

The manner in which the debtor compounds or arranges with his creditors must necessarily depend on the circumstances of each particular case. The instrument or document of exoneration is generally under seal; and where it is intended

(b) OF THE ASSENT OF CREDITORS.

GARRARD *v.* WOOLNER, M. T. 1830. N. P. 4 C. & P. 471; S. C. 8 Bing. 258.; S. C. 1 M. & Scott, 327.

It appeared that the plaintiff had attended a meeting of the defendant's creditors, and consented, with the other creditors, to a general assignment of their estate to trustees, in consequence of which a trust-deed was prepared; but the trustees refused to permit the plaintiff to sign it, because they discovered, subsequent to the meeting, that his claim was founded on transactions which they considered to be usurious—

Tindal, C. J., was of opinion, that the trustees were the agents of all the parties, and that their refusal was a repudiation of the plaintiff's right to claim under the deed, and had, therefore, the effect of placing him in his original situation.

If a party assents to a composition-deed*, but he is afterwards refused to be allowed to sign, his original rights revive.

(c) OF THE CONSIDERATION FOR SUCH ASSENT†.

(d) OF THE CONSTRUCTION‡ AND EFFECT OF THE DEED OR COMPOSITION CONTRACT.

MALTBY *v.* CARSTAIRS, H. T. 1828. K. B. 7 B. & C. 735; S. C. 1 M. & Ry. 549.

K. & Co. being bankers of A., and holding real as well as personal securities for any balance on cash advances, or on bills drawn or accepted or indorsed by him, received some of his acceptances for the accommodation of E. & Co. from M. another of their customers, as a security for his own notes; A. becoming bankrupt, E. & Co. entered into a deed of composition with their creditors, to which the

A composition-deed is only an extinguishment of the debts included in the deed, and between the immediate parties.

to operate as a release or discharge at law of a specialty claim, it is essential that it should be so; (see 7 Price, 604); for to a contract under seal, an agreement not by deed by the plaintiff with other creditors to give time, or accept a composition, cannot be pleaded at law as an answer to an action, though equity will sometimes relieve. (16 Ves. 372).

In practice it is usual for the creditors to sign a preliminary agreement to accept the composition, in which case it is prudent to insert a stipulation that the creditors shall, on being required, sign a formal deed.

* The assent of the creditor to the composition contract may either be express or implied; (*Butler v. Rhodes*, M. T. 1794, 1 Esp. 236; *S. P. Ellis v. Ollave*, T. T. 1698, K. B., 3 Salk. 59); and a verbal promise to accept a composition and execute the deed, will prevent the creditor from suing for the original cause of action; (*Bradley v. Gregory*, H. T. 1810; 2 Camp. 383); provided the original debt be not founded upon an instrument under seal. (*Lowe v. Eginton*, T. T. 1819, Ex., 7 Price, 604).

† At law, an agreement not under seal to give and receive a less sum than 20s. in the pound is not binding without some new and sufficient consideration: as, for instance, the appropriation of a fund for the liquidation of the claim; (*Heathcote v. Crookshanks*, T. T. 1787, K. B., 2 T. R. 24); or the whole or part be guaranteed by a surety; (*Steinman v. Magnus*, T. T. 1809, K. B., 11 East, 390; S. C. 2 Campb. 124; *S. P. Bradley v. Gregory*, H. T. 1810, 2 Campb. 383); or by the assignment of the debtor's effects. (*Butler v. Rhodes*, M. T. 1794, K. B., 1 Esp. 236).

‡ Deeds or instruments of composition are generally construed liberally, so as to give full effect to them; and though as against the debtor they will in some cases be construed strictly, yet equity will assist a composition of debts, if obtained without fraud and upon a fair representation. (1 P. Wms. 571; 1 Vern. 210; 3 Atk. 583; 2 Atk. 527; 16 Ves. 372).

assignees of A. and also K. & Co. were parties: but they executed it only upon receiving from the assignees of A. a written assurance that they should not thereby prejudice the real security they held from A. By that deed, reciting that certain of the creditors of E. & Co. were the holders of bills as securities for their debts owing from the partnership, and drawn upon or accepted or indorsed by A., and that the provisions to be made were to be accepted by the creditors, parties thereto, in full satisfaction of their debts, as well against E. & Co. as against the estate of A. in respect of the said bills drawn, accepted, or indorsed by them; and the deed contained releases to E. & Co. and their sureties therein named, (but not to A.), of all such bills, and covenanted to deliver up the same, which K. & Co. accordingly did to the trustees named in the deed; and E. & Co. in settling the accounts with A.'s assignees, delivered his acceptances, &c. over to them. K. & Co. after satisfying their demands on A. in respect of cash advances to him out of the proceeds of the real securities, claimed also to hold the surplus in satisfaction of their claim against A. in respect of such bills.

The Court held, that they were entitled to do so. The composition-deed did not extinguish the debt due to them from A. upon those bills, although E. & Co. were thereby released; by delivering up such bills the creditors did not give up any means of satisfaction already in their hands.

TATLOCK *v.* SMITH, M. T. 1829. C. P. 6 *Bing.* 339; S. C. 3 *M. & P.* 676.

And between these parties the acceptance of a composition deprives the creditor of his original rights so as to suspend his remedy.

THE defendants entered into an agreement with their creditors, by which trustees were appointed, to whom all the estate and effects of the defendants were to be conveyed and assigned, until each creditor was paid in full; the deed to contain "all usual and necessary clauses and conditions." The trustees took possession of the personal property, and paid 10s. in the pound on the debts. A deed of conveyance of the real property was prepared, which the defendants refused to execute, it not containing a clause of release. The deed had not then been executed by all the creditors, and the meeting at which it was produced was therefore adjourned. The plaintiffs in the meantime sued for the residue of their debt.

The Court held, that, the agreement purporting to contemplate a suspension of the right of action by the creditors, and, until a final meeting and execution of the instrument by the creditors and refusal by the defendants, the creditors being remitted to their former rights, the action was therefore premature.

STONEHOUSE *v.* READ, H. T. 1825, K. B. 3 *B. & C.* 669; S. C. 5 *D. & R.* 603.

Taking a compensation from the acceptor of a bill, and giving up the bill, is a satisfaction of the debt as regards other parties.

THE defendant was in the habit of accepting bills for the bankrupt, and before the bankruptcy and without his knowledge of the arrangement, the holders accepted a composition from the bankrupt at 10s. in the pound, "in order to relieve him from his responsibility to them," and gave up the bills.

Held, that it amounted in law to full payment, and a gift to him of the difference, and would have given him a right of action against the drawer if the amount of the bills had exceeded the balance in his hands belonging to the bankrupt. In an action, therefore, by

the assignees of the bankrupt, and a reference to an arbitration to take the accounts between them:—Held, that he was entitled to have the full amount of the bills allowed him on account.

WATTERS v. SMITH, M. T. 1831. K. B. 2 B. & Ad. 889.

ASSUMPSIT for work and labour by the plaintiff, who was house apothecary at the Royal Western Hospital, against the defendant, who was a subscriber and one of the committee. A letter was proved, written by the plaintiff's attorney to Hunter, (another of the committee-men), demanding the sum of 43*l.* 10*s.* for the plaintiff's salary, and an action was brought against Hunter to recover that sum. Hunter thereupon wrote to the plaintiff's attorney, complaining of the hardship upon him that he should be made to pay the whole demand, when there were so many others equally responsible, and offered to pay the sum of 15*l.* with the costs. This offer was accepted, and the following receipt given by the plaintiff's attorney:—"Watters v. Hunter. Received the 10th of May, 1830, of the defendant, by payment of Mr. Beechey, the sum of 20*l.* 14*s.*, being the amount agreed to be taken for debts and costs in this action."

But an acceptance of a composition from one of two parties jointly liable does not discharge the other, unless received in full satisfaction*.

The Court held this to be no satisfaction of the whole amount, nor a release of the remainder, and therefore no bar to an action against another joint contractor brought to recover the sum that remained due.

See *S. P. Fitch v. Sutton*, 5 *East*, 230.

(e) FRAUDULENT PREFERENCE.

HOWDEN v. HAIGH, E. T. 1840. Q. B. 3 P. & D. 661.

By certain articles of agreement, the plaintiff and the other creditors of the defendants agreed to accept 5*s.* in the pound upon their respective debts, upon the execution of the articles, by promissory notes at two months, with a satisfactory security for their payment; and the further remaining sum of 15*s.* in the pound to be paid by the defendant's own notes by three equal instalments, at six, nine, and twelve months from the date thereof. At the same time it was privately agreed between the plaintiff and the defendants, that they should indorse over to him, as an additional security, a bill of exchange accepted by certain other persons, to induce him to execute the articles of agreement, which was done, before his execution of the articles.

If a creditor signs a composition-deed upon receiving a security for the remainder of his debt, he can recover neither the composition nor upon the other security.

The Court held, that this private agreement was a fraud upon the other creditors, and vitiated the whole transaction as regarded the plaintiff, and disabled him from recovering upon the notes, which had been given to secure the remaining 15*s.* in the pound, as well as the composition itself.

See 11 *East*, 390; 4 B. & C. 513.

BRITTEN v. HUGHES, E. T. 1829. C. P. 5 Bing. 460; S. C. 3 M. & P. 79.

By an agreement entered into between the defendant and his creditors, reciting that the defendant was indebted to his said creditors

As all parties to a composi-

* An agreement by a creditor to accept part of his debt by composition, and another part by full payment, is not binding, being an accord without satisfaction. (*Greenwood v. Ledbetter*, 12 Price, 183).

tion are supposed to be in the same situation, one has no right to split his demand so as to gain a preference.

in the several sums of money set opposite to their respective names in the schedule thereunder written, the creditors, in consideration of a composition of 10s. in the pound upon and in respect of their said several debts, agreed to execute a general release. This deed was executed by the plaintiffs. Besides the amount inserted in the schedule as the debt of the plaintiffs, they held a bill of which the insolvent was the drawer. This bill, having afterwards been dishonoured by the acceptor, was put in suit against the insolvent.

Per Cur.—*Cecil v. Plaistow*, (1 Anstr. 205), is very like the present. The Court of Exchequer there held, that, where a creditor obtains from his debtor a new or separate security for part of his demand, and takes the composition for the other part only, it is a fraud upon the other creditors. *Per Mr. Baron Hotham*—"It is an unfair attempt to gain a superior advantage over them (the other creditors) by a fraudulent concealment of the truth. We think the principle is so firmly established, that it requires no further authority to support it. Where parties agree to sign a composition-deed they must all stand in the same situation; no advantage should be taken by any. Apply that principle to the present case. The plaintiffs agreed in common with the rest of the defendant's creditors to take a composition of 10s. in the pound. The other creditors would naturally conclude that they signed for the whole of their demand, without any reservation; whereas, in fact, they did not sign for a third. It is fair to presume that the creditors consented to accept the composition on the faith of all receiving the like proportion. Independently, therefore, of the terms of the deed, we are of opinion, that, if we were to decide in favour of the plaintiff's claim, we should be establishing a rule that would inevitably lead to frauds in the execution of instruments of this nature.

ALSAGER v. SPALDING, E. T. 1838. C. P. 4 Bing. N. S. 407.

And a creditor, who refuses to take a composition, unless a policy of insurance be assigned, commits such a fraud on the other creditors that he cannot retain it.

A TRADER assigned a life policy to the defendants as a collateral security for a debt, and becoming embarrassed, proposed a composition to his creditors, some of whom refused to assent, unless the defendants signed the deed. The defendants refused, unless the policy was assigned to them at the office value, and this being assented to, they received composition-notes with the other creditors, who signed the deed in ignorance of the assignment of the policy. Upon the dropping of the life insured, and the receipt of the money from the office by the defendants, an action for money had and received was brought to recover the money so received by the defendants under the policy of insurance. At the trial a verdict was found for the plaintiff. On motion to set it aside, it was argued for the plaintiff.—The sole question for the consideration of the Court here was, did the conduct of the defendants amount to a fraud upon the other creditors? Of this there could not be the slightest doubt; and this being so, all the authorities from *Cockshott v. Bennett*, (2 T. R. 763), and *Leicester v. Rose*, (4 East, 372), downwards to *Turner v. Hoole*, (1 D. & R., N. P. C., 27), shew what the legal consequence must be. The defence generally set up on occasions analogous to this, as in *Smith v. Bromley*, (Doug. 696), and *Williams v. Hedley*, (8 East, 378), and the cases there cited, is, that, as the parties are in *pari delicto*, one should not be called upon to refund; but to such attempted justification, at least so far as this

case goes, Lord *Ellenborough* has given the proper answer in *Smith v. Cuff*, (6 Mau. & Selw. 160), where his lordship said: "This is not a case of *par delictum*; it is oppression on one side, and submission on the other. It never can be predicated as *par delictum*, when one holds the rod and the other bows to it." Again, his lordship asked,—“Is there any case, where money having been obtained extorsively and by oppression, and in fraud of the party's own act as it regards the other creditors, it has been held that it may not be recovered back?”—For the defendant, it was admitted impossible to distinguish the present from the cases referred to on the other side, or to establish any peculiarity in that which formed the subject of discussion, which could lead the Court to adopt a principle different from that which had been so repeatedly acted upon.

And the Court agreeing in this opinion, ordered the rule to be discharged.

COLEMAN v. WALLER, E. T. 1829. Ex. 3 *Y. & J.* 212.

A CREDITOR, in respect of two demands, seized the goods of B., his debtor, under an execution for one of the two debts, and afterwards, at a meeting of some of the creditors of B., when a composition was proposed, declared that he would not agree to the composition unless the debt for which the goods had been seized was secured to him. C., who was not a creditor, guaranteed the debt, and A. withdrew his execution and signed the composition-deed. In an action on the guarantee, the plaintiff had a verdict, subject to an application for a nonsuit. On motion for that purpose—

Per Cur.—We are of opinion, that, in this case, a nonsuit should be entered. The principle upon which the Court are of this opinion is the same as decided the case of *Cockshott v. Bennett*, (2 T. R. 763), followed by many other decisions. This security was given to induce the plaintiff to sign a composition-deed, by which he held himself out to the other creditors as accepting 10s. in the pound, and thereupon discharging the debtors. He did, in effect, sign the deed, agree to accept this diminished sum, and discharge the debtor; but takes a security from a third party. This comes directly within the principle of that class of authorities to which we have alluded. We think there must be a nonsuit.

So, a security given by a third party to induce a creditor to sign, is void.

KNIGHT v. HUNT, E. T. 1829. C. P. 5 *Bing.* 429; S. C. 3 *M. & P.* 18.

THE plaintiff agreed to accept a composition of 10s. in the pound for a debt, on his debtor's brother agreeing to supply him with coals to the amount of the remaining moiety of the debt. The plaintiff was the last person who signed the agreement for the composition. The coals were delivered, and the plaintiff afterwards sued the surety on the composition-note.

Per Cur.—Agreements for compositions should be made with the strictest good faith. If a creditor affect to take from his debtor 10s. in the pound, when, by a secret agreement, he stipulates for the full amount of his debt, he is guilty of a fraud upon the rest of the creditors, who might have been induced to accept the composition by his apparent acceptance of it. The true principle, in cases of this kind, is, that all the creditors must be put in the same condition. The plaintiff cannot recover.

And a note given for a composition is void, if the creditor has derived a benefit from a third person in consideration of taking the composition.

TOOK *v.* TUCK, E. T. 1827. C. P. 4 *Bing.* 224; S. C. 12 *Moore*, 435.

But a creditor who signs a composition-deed may take a bond for his debt if the composition be not paid, and two years elapsed.

IN debt on bond, plea, that it was obtained in fraud of the defendant's other creditors. It appeared that the party, with other creditors, had agreed to a composition, and to release the defendant, and that divers of them signed the deed of which the party had notice, but that two years after, having received no part of the composition, the defendant executed the bond.

The Court held the bond good: it is the pretending to accept the same terms as the other creditors, and so encouraging them to come into the composition, when the party so pretending has at the time secured to himself some advantage of which the others are not to partake, which constitutes the fraud on the other creditors.

(f) OF THE AVOIDANCE OF THE DEED OR COMPOSITION CONTRACT.

OUGHTON *v.* TROTTER, T. T. 1833. K. B. 2 *N. & M.* 71.

Where creditors agree to a composition, provided notes be given within a certain time, if not given within the time, they may resort to their original rights.

AT a meeting of the creditors of Edward Trotter, held 7th day of April, 1831:—"Resolved, that the offer of 6s. in the pound as a composition be accepted by the undersigned; and that, therefore, the necessity for an assignment to trustees be superseded, such composition to be made in two payments by the joint and several promissory note of W. W. Cox and E. Trotter. A release to be executed to E. Trotter, with the usual proviso, that, if the instalments be not punctually paid, the release shall be void. The notes to be given within fourteen days, the creditors assenting thereto within that time." It did not appear that any further step was taken until the 31st of May. An application was made to the plaintiff on that day to execute a release to the defendant, which he refused, and brought this action for goods sold, &c. It was objected for the defendant, that, as the plaintiff had agreed to take a composition for his debt, he could not bring an action for the original demand. A verdict was thereupon taken for the defendant.

The Court held, that the delivery of the notes to the creditors within the fourteen days was a condition to be performed by the debtor; failing which, the creditors were remitted to their original rights.

CONSTABLE *v.* ANDREW, M. T. 1834. Ex. 2 *C. & M.* 298.

Under a composition secured by a third party by bills, on the dishonour of the bills the debtor's liability revives.

THE plaintiffs, with other creditors, entered into an agreement with the defendant, whereby he agreed to pay them a composition of 15s. in the pound, by two instalments; and a surety, in consideration of the creditors discharging the defendant from all debts and demands on receiving such 15s. in the pound, agreed to pay a sum of money in part payment of the first instalment, and to accept a bill of exchange drawn by the defendant in part payment of the second, the creditors agreeing "to exonerate and discharge the defendant on payment of the said 15s. in the pound." It was further agreed, that several bills of exchange, the amount of which was equal to the residue of the sum payable on the composition before indorsed by the defendant and handed over to the plaintiffs, should "be considered as in part payment of the said 15s. in the pound."

The Court held, that the bills left in the hands of the plaintiffs were not under the agreement to be considered an absolute payment, but that the liability of the defendant thereon still continued, and might be resorted to on the dishonour of the bills.

VINE *v.* MITCHELL, H. T. 1834. N. P. *M. & Rob.* 337.—S. P.
WENHAM *v.* FOWLE, M. T. 1834. K. B. 3 *D. P. C.* 43.

THE plaintiffs pressing the defendant for a settlement of his account, his son expressed his inability to pay them, but proposed to them that they should take a composition of 10s. in the pound upon the amount of their debt. After a day or two's consideration, the plaintiffs agreed to take the composition. It did not appear that the defendant had at the time any other creditors than the plaintiffs. The plaintiffs had subsequently supplied the defendant with goods on credit, and had been paid for them. The present action was brought to recover the balance remaining unpaid on their original demand of 700*l.* odd. It now appeared that, at the time when the plaintiffs were induced to agree to the composition, the defendant was entitled under his marriage settlement to a life interest of considerable value in some leasehold property expectant on the death of Mrs. Turner, and that circumstance was not communicated to the plaintiffs.

A creditor who signs a composition-deed upon the debtor's representation as to his effects, if it turns out he has suppressed property, the creditor is not bound by the composition.

Per Tindal, C. J.—The question is, whether the defendant had fraudulently suppressed the fact of his having the beneficial interest in the leasehold property, and that depended on the question, whether, at the time when the composition was entered into, the parties were dealing upon the understanding that the defendant had not other available property than his book-debts? If the question had been asked, and the defendant had said he had no other available property, that would have been clearly fraudulent, and the circumstance of the question not having been in terms asked made no difference, if the jury thought, from all the circumstances, that such was the impression on the mind of the plaintiffs.

WOODHAM *v.* EDWARDS, E. T. 1837. Q. B. 1 *N. & P.* 207.

THE plea to an action of assumpsit against the defendant as acceptor of several bills of exchange, stated, that, after the time of payment, the defendant, being resident in Scotland, in consideration that certain of his creditors should forbear to sue, made his deed according to the law of Scotland, by which he, the defendant, assigned his personal property in Scotland for the benefit of his creditors; that notice of the deed was given to the plaintiff, and that plaintiff, by a writing effectual by the law of Scotland, nominated R. H. as his attorney to concur in and adopt the deed, and to receive the dividends. The plea then stated, that R. H. had adopted the deed; that divers other creditors had accepted the assignments; that the causes of action arose before the execution of the deed; that all the proceedings were in conformity with the law of Scotland, whereby the defendant, by the law of Scotland, hath become absolutely discharged from the causes of action. Replication, that the defendant hath not become, nor is discharged, *modo et formâ*—

A plea that the defendant was discharged under a composition by the law of Scotland, is not sufficient, unless it disclose a defence by the law of England.

The Court held—first, that the law of Scotland was put in issue;

and secondly, that the plea did not disclose a defence by the law of England, as it did not appear that the plaintiff had executed the deed, or induced any other creditor so to do, or in any way precluded himself from suing on the original debt.

(g) OF COLLATERAL PARTIES, SURETIES, AND TRUSTEES.

ROSE *v.* EDWARDS, T. T. 1837. Ex. 1 *M. & W.* 734; S. C. 1 *T. & G.* 975.

A. assigned his trade to B., his brother, in consideration of his securing a composition; A. still carried on the trade for B.:—Held, that B. was liable for goods ordered by A.*.

A PARTY being insolvent assigned over his stock to his brother, carrying on a different trade, in consideration of his securing 2*s.* 6*d.* in the pound of a composition of 5*s.* made with the creditors; he continued to manage the business for the brother, whose name was over the door, and upon an application by a creditor for payment of the composition, offered a bill, exceeding the amount, with his brother's name as indorser on it, but without authority; and an agreement was made that the balance should be made up in goods to be supplied for the shop; the brother's wife, who occasionally went to the shop, being a consenting party. Upon the dishonour of the bill, and an action against the brother on the bill and for goods, the jury finding that there was a general authority to buy goods for the shop, and that the goods were not sold on the credit of the bill alone, but on that of the brother—

The Court held, that the value of the goods might be recovered, although the jury negatived the indorsement on the bill being the defendant's, and that he had ever had notice of the dishonour.

OWEN *v.* BODY, E. T. 1836. K. B. 6 *N. & M.* 448; S. C. 5 *Ad. & E.* 28.

An assignment by a debtor to a trustee, which might make the creditors partners, is not valid†.

AN hotel-keeper, at the time of his license expiring, being in difficulties, assigned all his stock in trust to continue the trade, and out of the profits to pay a dividend to such creditors as would execute the deed of assignment; and a license was afterwards taken out and assigned to the trustee—

The Court held—first, that the assignment of the trade, &c., at the time there was no license, did not render it illegal, it not being

* Where the defendants (trustees under an assignment of the stock in trade of A.) directed the plaintiff to proceed to B., to effect the liberation of A., and arranged that L. should remit funds for that purpose to the plaintiff there:—Held, that the letter of L. was inadmissible as proof of the facts stated in it; held also, that the acts of a party put into the shop of A. to conduct the business might bind the defendants in what concerned the business, but not to employ a person to take stock. (*Lawrence v. Thatcher*, 1834, N. P., 6 C. & P. 669).

† A creditor, who signs a composition-deed, but omits to insert the amount of his debt against his name in the schedule, may, after notice of the amount, sue the trustee, who covenants to pay. (*Daniel v. Saunders*, 2 Chit. Rep. 564). If, after a commission is issued, it is agreed between the creditors and a friend of the bankrupt, that the funds shall be vested in a trustee, who shall give his note for 5*s.* in the pound, and the commission not to proceed, but the agreement to be void in case any of the creditors to the amount of 10*l.* refuse within fourteen days; and the notes are given; but a creditor refuses to execute, and the commission proceeds: the notes cannot be enforced by a creditor. (*Enderby v. Corder*, M. T. 1825, N. P., 2 C. & P. 203).

certain nor intended that any thing illegal should be done; but, secondly, that as, by sharing the profits, the creditors executing might become partners—a liability they were not bound to submit to, the assignment was not valid.

HARRIS v. LOYD, E. T. 1840. Ex. 5 M. & W. 432.

THE plaintiffs being trustees under a deed of assignment for the benefit of creditors, on the same day, although before the execution of the deed, a fi. fa. was delivered to the agent of the sheriff under which the officer took possession, and the plaintiffs, in order to release the goods, paid the amount. The debtor having, as it afterwards appeared, previously committed an act of bankruptcy, on which a fiat issued, the plaintiffs commenced an action against the sheriff to recover back the money so paid—

The Court held the action not maintainable, on the ground of payment under a mistake of fact.

Trustees under a composition-deed, who pay out an execution under a mistake in fact, cannot recover back the money.

(h) ACTIONS—PLEADINGS AND EVIDENCE CONNECTED WITH.

METCALFE v. BYCROFT, E. T. 1817. K. B. 6 M. & S. 75.

IN an action of covenant on a deed of composition with creditors by one of two partners, who signs the deed in the name of his firm, and sets his seal thereto—

The Court held, that on non-payment of an instalment due on the partnership debt, the other partner, not being a party to the deed, could not join in covenant.

If one of several partners sign a composition-deed he must sue alone*.

REAY v. RICHARDSON, T. T. 1835. Ex. 2 C. M. & R. 422.

TO a declaration on three bills of exchange, the defendant pleaded, that he was also indebted to E. F., and to divers other persons in divers other sums of money, of which the plaintiffs had notice; and that afterwards and before the said bills became due, and whilst he was so indebted to the said E. F. and the said other persons, he the defendant became insolvent and unable to pay his debts. That thereupon, in consideration of the premises, and with the view and intention of inducing, and of enabling the said defendant to induce the other creditors of the defendant to accept and receive a composition of one moiety of their debts, and in consideration that the defendant would pay to them, the said plaintiffs, half the amount of the said bills when the same respectively became due, the said plaintiffs agreed to accept a composition of one half of the amount of the bills as they became due; and that afterwards the said agreement so made and entered into by the plaintiffs, was, by the defendant, with their knowledge and by their direction represented and made known to the said E. F., so being such creditor as aforesaid; who, thereupon, in consideration of the premises, and in faith of that agreement was lead and induced to accept that composition;

A plea of composition must shew that the condition on which the plaintiff entered into it has been performed.

* Where the defendant, a creditor of the plaintiff, executed with other creditors a composition-deed, which stipulated for payment at 6s. in the pound by notes, after which he obtained payment in full from the plaintiff, who now sought to recover back the difference:—Held, that he could not recover without shewing the composition-notes given by him to have been paid, or giving some evidence that is equivalent. (*Ward v. Bird*, 1832, N. P., 5 C. & P. 229).

and that he, the said E. F., had not at any time since recovered or received, or sought to recover or receive any greater or other sum than half the amount of his said debt. On motion in arrest of judgment—

The Court held the plea was bad; inasmuch as it did not shew that all or the great body of the defendant's creditors had come into the arrangement and agreed to take the composition.

COOPER *v.* PHILLIPS, M. T. 1334. Ex. 1 C. M. & R. 649; S. C. 5 *Tyrv.* 166.

A plea, that the plaintiff agreed to accept a composition, but without averment of tender or money paid into Court, is bad.

PLEA of non assumpsit as to all except £——, and as to that sum that plaintiff and all defendant's other creditors agreed to accept a composition of 5*s.* in the pound, to be paid at certain dates; and that the defendant was always ready and willing to pay, but no tender or payment into Court was alleged or shewn.

The Court held, that the plea was no answer as to the sum agreed to be taken, there being no consideration for the plaintiff's discharging the defendant from payment of it; the money should have been paid into Court.

REAY *v.* WHITE, T. T. 1833. Ex. 1 C. & M. 748; S. C. 3 *Tyrv.* 596.

The plaintiffs agreed to accept a composition, the balance to be afterwards ascertained; a dispute arose as to the actual balance:—Held, that the plaintiffs claiming a larger amount dispensed with a formal tender*.

THE plaintiffs and other creditors of the defendants having agreed to accept a composition for their debts by notes payable at stipulated periods, upon an account being sent to them by the defendants, claimed a larger balance, but said they would arrange with the defendants, and do as the other creditors did. The other creditors received the composition and signed a release, but the balance between the plaintiffs and defendants was not adjusted before the time stipulated for payment of the notes; and, the plaintiffs' attorney having made a demand for the original debt, the defendants' attorney offered to pay the composition upon the balance claimed by the plaintiffs, but did not tender either cash or notes to that amount. The plaintiffs' attorney refused to accept less than the whole debt.

Per Cur.—The plaintiffs have agreed to accept the composition as soon as the account was settled, and it was as much their duty as it was the duty of the defendants to adjust the account. The account was rendered on the part of the defendants, and many applications were unsuccessfully made to the plaintiffs to settle the account, but the settlement was delayed from time to time. Before the action was commenced, the defendants' attorney offered to pay the composition on the footing of the plaintiffs' account; but the plaintiffs' attorney refused to accept less than the full demand. Under such circumstances it was not necessary to produce the notes and tender them; but the offer having been made by one professional man to another, and declined, we think the defendants were within the terms of the agreement.

* If a defendant has entered into a deed of composition with his creditors, containing the usual clause of release, and the plaintiff has executed the deed as a creditor for a certain sum, that is a good defence to an action by the plaintiff as indorsee of a bill to a larger amount, of which the defendant was indorser, and which then lay dishonoured in the plaintiff's hands; but it is no defence as to two similar bills, also of larger amount, which the plaintiff had paid, and which were then in the hands of third parties. (*Margetson v. Aitken*, 1826, N. P., 3 C. & P. 338).

REAY v. RICHARDSON, T. T. 1835. Ex. 2 C. M. & R. 422.

A PLEA to a declaration on bills of exchange stated, that the plaintiffs, with the view of inducing and enabling the defendant to induce other creditors to accept a composition of one moiety of their debts, agreed to accept that composition upon their debts; and that the defendant with their knowledge and assent communicated their agreement to one other large creditor, who was lured and induced thereby to accept that composition, and had not since received payment of more than that composition. To prove the plea the defendant put in the letter of one of the plaintiffs, wherein he agreed to accept the composition.

A letter is evidence of an agreement to take a composition; and a previous conversation is evidence to shew the motives under which the letter was written*.

The Court held, that the letter was evidence and proof of a previous conversation, in which he made inquiries respecting the conduct of the other creditors, and was admissible to prove the motive which induced him to write the letter, and the object for which his consent was given.

(i) OF COMPOSITIONS AS CONNECTED WITH BANKRUPTCY †.

(j) OF STAMPING DEED OR CONTRACT OF COMPOSITION ‡.

* An admission of the amount of the debt made to the plaintiff's attorney, who had at the request of the defendant called on him with the view to a composition of 10s. in the pound, held admissible. (Per *Park, J.*—*Hill v. Elliott*, 1832, N. P., 5 C. & P. 436).

† The 133rd sect. 6 Geo. 4, c. 16, enacts, "That at any meeting of creditors after the bankrupt shall have passed his last examination, (whereof and of the purport of which twenty-one days' notice shall have been given in the London Gazette), if the bankrupt or his friends shall make an offer of composition or security for such composition, which nine-tenths in number and value of the creditors assembled at such meeting shall agree to accept, another meeting for the purpose of deciding upon such offer shall be appointed, whereof such notice as aforesaid shall be given, and if at such meeting nine-tenths in number and value of the creditors then present shall also agree to accept such offer, the Lord Chancellor shall and may, upon such acceptance being testified by them in writing, supersede the said commission."

By sect. 134.—"That in deciding upon such offer as aforesaid, any creditor whose debt is below 20*l.* shall not be reckoned in number, but the debt due to such creditor shall be computed in value; and that any creditor to the amount of 50*l.* and upwards residing out of England shall be personally served with a copy of the notice of the meeting to decide upon such offer as aforesaid and of the purpose for which the same is called, so long before such meeting as that he may have time to vote thereat, and such creditor shall be entitled to vote by letter of attorney executed and attested in manner hereby required for such creditors voting in the choice of assignees; and if any creditor shall agree to accept any gratuity or higher composition, for assenting to such offer he shall forfeit the debt due to him, together with such gratuity or composition, and the bankrupt shall, (if thereto required), make oath before the commissioners that there has been no such transaction between him, or any person with his privity, and any of the creditors, and that he has not used any undue means or influence with any of them to attain such assent as aforesaid."

‡ When a debtor compounds with his creditors, and each creditor signs the same deed, covenanting, either to give a further day of payment, or to take a certain sum as a composition, the whole being only one transaction, a separate stamp for each person is never required. (*Bowen v. Ashley*, E. T. 1805, C. P., 1 N. R. 274).

II. DEEDS OF INSPECTION*.

III. LETTERS OF LICENSE†.

Compounding.

(See *tit. Bankrupt—Composition with Creditors—Money paid—Post—Horse Duty.*)

I. RELATIVE TO CIVIL PROCEEDINGS, p. 650.

II. RELATIVE TO CRIMINAL PROCEEDINGS, p. 651.

I. RELATIVE TO CIVIL PROCEEDINGS‡.

REX *v.* GIBBS, H. T. 1835. B. C. 3 D. P. C. 345.

If part of the penalty goes to the Crown, the attorney-general must consent,

ON motion for leave to compound a penal action, it appeared that a portion of the penalty was to go to the Crown. One difficulty was, that the applicant had not the consent of the attorney-general.

Patteson, J.—Unless you have the attorney-general's consent, the Court cannot grant you leave to compound.

* When creditors agree to give time, but require that the debtor's affairs shall be investigated and his future business superintended by them or their representatives until the debts have been paid, the instrument is usually a bond or deed of inspection. This document is generally entered into between the debtor of the first part, the trustees or inspectors of the second part, and the creditors of the third part, and by which the creditors covenant not to molest the debtor for an indefinite or definite period, but to give him license to carry on his trade or profession for their benefit, his affairs &c. being subject to the inspection of such trustees or inspectors who are usually invested with powers to inspect books and vouchers and generally to regulate the trade.

† In instances where a trader appears to be in insolvent circumstances, his creditors for reasons of policy or humanity frequently allow him a longer time for the payment of his debts by granting him an instrument or writing called a letter of license. The general object of this is, to protect him from arrests in going about his affairs. It usually confers a privilege on the debtor to be exempt from arrest, (and see 1 & 2 Vict. c. 110, ante, *tit. Arrest*), and also to compound his debts; and the creditors in general severally covenant, that if the debtor shall receive any molestation or hinderance from any of them he shall be acquitted and discharged of his liabilities as against such creditors.

‡ By 18 Eliz. c. 5, s. 8, and 27 Eliz. c. 10, it is enacted, "That no common informer or plaintiff shall or may compound or agree with any person that shall offend, or that shall be surmised to offend, against any penal action for an offence committed, or pretended to be committed, but after answer made in court to the information, or suit in that behalf exhibited or presented; nor after answer, but by the order or consent of the court in which same information or suit shall be depending, upon the pains and penalties therein set down and declared;" that is to say, by sect. 4, such informer is upon conviction to stand in the pillory (now abolished) for two hours, and shall for ever be disabled from being plaintiff or informer in any penal action, and forfeit 10*l.*, half to her Majesty, and half to the party grieved. But these acts only apply to common informers, and not to the party grieved; (*Kirkham v. Wheeley*, T. T. 1694, K. B., 1 Salk. 30); and do not extend to a case where an action has not been actually commenced. (*Gordon v. Powis*, T. T. 1771; C. P. 2 Blac. 781). Giving leave to compound is discretionary in the courts; (*Howell v. Morris*, M. T. 1774, C. P. 1 Wils. 79; S. P. *Beller v. Beale*, M. T. 1797, K. B., cited 1 Tidd, 575, 7th edit.); therefore a *bonâ fide*, (*Wood v. Johnson*, T. T. 1777, C. P., 2 Blac. 1157), but not a collusive composition, will be suffered. (*Wood v. Cassau*, T. T. 1777, C. P., 2 Blac. 1157).

REG. GEN., K. B., C. P., and Ex., H. T., 2 Will. 4. 1 *Dowl. P. C.* 196; 8 *Bing.* 303; 1 *M. & Scott*, 429; 3 *B. & Ad.* 389; 2 *C. & J.* 196; 2 *Tyrv.* 350.

IT is ordered that leave to compound a penal action shall not be given in cases where part of the penalty goes to the Crown, unless notice shall have been given to the proper officer; but in other cases it may.

or notice must be given.

REX v. COLLIER, T. T. 1834. K. B. 2 *D. P. C.* 581.

ON motion for leave to compound a penal action, it did not appear from the affidavit whether the defendant had pleaded or not.

The motion must be after plea*.

The Court refused the rule, as such motion must be made after plea.

II. RELATIVE TO CRIMINAL PROCEEDINGS†.

By 7 & 8 Geo. 4, c. 29, s. 58, it is enacted, "That every person who shall corruptly take any money or reward, directly or indirectly, under pretence or upon account of helping any person to any chattel, valuable security, or other property, which shall, by any felony or misdemeanour, have been stolen, taken, obtained, or converted, shall (unless he cause the offender to be apprehended and brought to trial for the same), be guilty of felony; and be transported for life, or not less than seven years, or imprisonment, with or without hard labour, for not more than four years."

Rewards for helping to stolen goods punishable by transportation.

* Penal actions can only be compounded by leave of the Court, and not of a judge at N. P.; (*Morgan v. Lute*, E. T. 1819, K. B.; 1 Chit. Rep. 381); and the application should be made early; but under special circumstances it has been allowed after verdict; (*Crowder v. Wagstaff*, E. T. 1797, C. P., 1 B. & P. 18; S. P. *Maughan v. Walker*, H. T. 1793, K. B., 5 T. R. 98); and even where the defendant was in execution. (*Bradshaw v. Mottram*, E. T. 1720, K. B., 1 Stra. 167).

On compounding penal actions in which the King participates in the penalty, the portion due to the Crown must be previously paid to the prothonotary in the C. P.; (*Wood v. Ellis*, T. T. 1777; C. P., 2 Blac., 1154); and to the master of the Crown Office in the K. B. (*Brown v. Bailey*, M. T. 1766, K. B., 4 Burr. 1929). And where proceedings in a penal action are stayed on payment of a sum of money, this is a sufficient undertaking on the defendant's part to pay that sum, to authorize the granting of an attachment on non-payment. (*King v. Clifton*, E. T. 1793, K. B., 5 T. R. 257; S. P. *Hart v. Draper*, T. T. 1816, C. P. 7 Taunt. 43; S. C. 2 Marsh. 358).

By the 18 Eliz. c. 5, s. 4, it is a misdemeanor to compound penal statutes unless the Court consents; and it has been holden that a party is liable to the punishment prescribed by that act for taking the penalty imposed by a penal statute, though there has been no proceeding for the penalty; (*Rex v. Gotley*, Lent Assizes, 1805, 1 Russ. & Ry. 84); but the stat. 18 Eliz. c. 5 does not apply to offences cognisable only by a magistrate; and an indictment for compounding such transgressions was therefore holden bad. (*Rex v. Crisp*, H. T. 1818, K. B., 1 B. & A. 283).

† The offence of compounding felony has always been deemed highly penal. It was formerly holden to render the party an accessory to the original crime; (See 4 Blac. Com. 134); but now it is only a misprision, and punishable by fine and imprisonment. (See 1 Hale, P. C. 546).

A misdemeanor cannot be compounded; therefore a bond given for such a purpose is illegal; (*Collins v. Blanter*, 2 Wils. 341); but where the offence more immediately affects individuals, it is not unusual for the parties to declare themselves satisfied; (see Cro. C. C. 21); as where a person had been convicted of ill-treating a parish apprentice, the Court offered, that, if he would pay a certain sum for the expenses of the prosecution, the sentence should be for a shorter period of imprisonment; and a note given by him for such sum was holden unobjectionable. (*Bailey v. Wingfield*, 11 East, 46).

REGINA v. DALY, 1840. C. C. C. 9 C. & P. 342.

Any terms upon which a felony is compromised are illegal;

ON an indictment for stealing cloth, the prosecutor admitted, in consequence of some conversation he had with the prisoner on the subject of the robbery, he had signed a certain paper to forgive him, and not prosecute according to law in any court of justice, provided he, the said prisoner, did make known the whole of the circumstances which might in any way or manner tend to lead to a recovery of the said property.

Gurney, B., said, the law does not authorize any private person to forego a prosecution upon any terms; and that such a promise was not binding, and illegal. —

REGINA v. BEST, 1840. N. P. 9 C. & P. 368; S. C. 2 *Moody*, C. C. 124.

even though, in fact, no offence had been committed.

A. THREATENED B. that he would inform against him for selling spirits without a license, unless B. would give him a sum of money. B. had not in fact sold any spirits; but he gave A. the money to prevent an information.

Bosanquet, J., held that A. was indictable under the statute 18 Eliz. c. 5, s. 4, although B. had not committed any offence, and although no information was ever preferred, nor any process sued out.

Compromise*.

ATLEE v. BACKHOUSE, T. T. 1837. Ex. 3 M. & W. 633.

A payment previous to a compromise of an excise seizure, to which no reference is made, cannot be recovered back†.

AFTER a seizure by the excise of spirits, and several applications made for the restoration, on giving bonds for securing any penalties which might have been incurred, or paying the value into the receiver's hands to abide the event, which were refused; the defendants then offered "to give up all claim to seizure," and hold themselves responsible for such proceedings as might be instituted; upon which, on the receipt of the money, they were given up. A general verdict was afterwards found against the parties, and one

* An offer to pay money by way of compromise is not evidence of the existence of a demand. The reasons assigned for this doctrine by Lord Mansfield were, "that it must be permitted to men to buy their peace, without prejudice to them if the offer did not succeed; and such offers are made to stop litigation, without regard to the question whether any thing, or what is due." If the terms "buy their peace" are attended to, they will resolve all doubts as to the admissibility of this kind of evidence: thus, if A. sue B. for 100*l.*, and B. offer to pay him 20*l.*, it shall not be received in proof; for this neither admits nor ascertains any debt, and is no more than saying he would pay 20*l.* to get rid of the action. (See Bull, N. P. 236). And Lord *Kenyon*, C. J., is stated to have held, that an admission made, pending, and under the faith of a treaty, and into which the party might have been led by the confidence of an executed compromise, could not be given in evidence to his prejudice; but that, under such circumstances, the admission of a fact, such as the handwriting of the party, which was not connected with the merits, might be received in evidence; (1 Esp. 143); and where the attorney for the plaintiff in ejectment, founded upon the demise of an infant, makes a *bonâ fide* compromise with the tenant, who thereupon attorns to the infant, the latter, at full age, cannot bring a new ejectment without notice. (2 Esp. 530). See tit. *Attorney*.

† An offer of a specific sum by way of compromise, and not said to be without prejudice, held admissible as good *primâ facie* evidence of liability. (*Wallace v. Small*, 1830, N. P., 1 M. & Malk, 446).

penalty by consent taken. In an action to recover back the former sum paid—

The Court held, that the payment having been made upon a compromise and voluntary settlement upon good consideration, the goods having been rightfully taken, it was final, and the action not maintainable.

Computation of Time. See tits. *Bail—Bankrupt—Bills and Notes—Time—Warrant of Attorney.*

Concealment. See tits. *Bankrupt—Bastard—Births—Fraudulent Assignment.*

Concerted Act of Bankruptcy. See tit. *Bankrupt.*

Conclusion. See tits. *Declaration—Pleas—Replication—Rejoinder.*

Concurrent Conditions. See tits. *Condition—Covenant.*

Condemnation. See tits. *Insurance—Prize—Ship and Shipping.*

Conditions.

See also tits.

<i>Auctions and Auctioneer,</i>	<i>Lease,</i>
<i>Charter-party,</i>	<i>Mortgage,</i>
<i>Cognovit,</i>	<i>Offices, Sale of.</i>
<i>Contract,</i>	<i>Payment,</i>
<i>Copyhold,</i>	<i>Performance,</i>
<i>Covenant,</i>	<i>Recognisance,</i>
<i>Deed,</i>	<i>Remainder,</i>
<i>Devise,</i>	<i>Rent,</i>
<i>Ejectment,</i>	<i>Sheriff,</i>
<i>Elegit,</i>	<i>Tender,</i>
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I. DEFINITION; DIFFERENCE BETWEEN A CONDITION
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* The term "condition," in a legal as well as a popular sense, signifies in general the reverse of absolute or indefeasible. It imports some quality annexed, either by implication or express declaration, to a real estate, personal chattel or contract, by which, on the happening of an uncertain event, such estate or contract may be defeated or enlarged. There are six several kinds of conditions:—

1. A simple condition in deed.
2. A condition subsequent to the estate.
3. A condition annexed to the rent, &c.
4. A condition that defeats the estate, &c.
5. A condition that defeats not the estate before an entry; and
6. A condition in the *affirmative*, which *implies* a negative; as the words "being behind or unpaid" imply a negative, viz., not paid; (Co. Litt. 201. b).

There are four requisites essential to the validity of a condition:—

1. That it be not in contravention of any statute, nor inconsistent with the common law.
2. That it be created by appropriate words.
3. That in the case of real property it restrain the estate.
4. That it give title of re-entry.

In the civil law conditions are defined to be "pactions, which regulate that which contractors have a mind should be done, if a case which they foresee should come to pass." (See Domat., lib. 1, tit. 1, sect. 4).

Between a condition and a limitation there is this difference; a limitation marks the utmost time of continuance; a condition marks some event, which, if it happens in the course of that time, is to defeat the estate.

The peculiar characteristics which distinguish covenants from conditions are scarcely capable of being delineated by any general rule or clear definition. The text writers offer no criterion beyond the citation of different examples, given, not as illustrations of doctrines antecedently expounded, but as affording in themselves evidence of the difference which exists between the two. It is, however, quite clear, that no express form of words is essential to the creation of the one or the other, although the adoption of particular terms might afford some evidence of the intention of the parties. Thus, if a man makes a lease for years by indenture, provided always, and it is covenanted and agreed between the parties that the lessee shall not alien, this is both a condition and covenant. (Co. Litt. 203, b.

II. HOW CONDITIONS MAY BE CREATED*.

DOE *d.* HENNIKER *v.* WATT, E. T. 1828. K. B. 8 B. & C. 308.

A condition is as binding not under seal as if under seal.

IN ejectment, a verdict was found for the plaintiff, with liberty for the defendant to move for a nonsuit if the Court should be of opinion that the stipulation contained in the instrument in question was not a condition. The instrument in question was in the following words: it was not under seal:—

“Memorandum of agreement made with George Watt, bailiff of

Roll. Abr. 408; Co. Lit. 204). If a man leases for years, and in the indenture there is such a clause—*et non licebit* (to the lessee) *dare, vendere, vel concedere, statum et terminum suum alicui personæ, sine licentiâ* (of the lessor), *subpœna foris facturæ termini prædict*’—this is a good condition; (Roll. Abr. 408; Leon., 246, S. C.); but if a man leases for years, and the lessor covenants that the lessee shall have house-bote, hay-bote, and plough-bote, without committing waste, upon pain of forfeiture of the lease, this is a covenant on the part of the lessor, and therefore no condition; and, by Anderson and Beaumont, the covenant is no more than the law appoints; therefore that, and all that is subsequent to it, is void. (Cro. Eliz. 604).

* *By express words.*—Conditions are either in deed, that is, expressed by language in the instrument by which they are created, or else in law, that is, implied by the common or statute law. Thus, where a feoffment or lease is made, reserving rent payable at a certain day, with a proviso, that if it is not paid on that day the feoffor or lessor may re-enter, this is a condition in deed. (Co. Lit. 325; 5 Vin. Ab. 42). An express condition cannot be annexed to an estate without deed; (Co. Lit. 225); hence, a man cannot plead a condition to defeat an estate without shewing an instrument under seal; (Co. Lit. 225; Com. Dig., Pleader, O. j., &c.); but a different rule prevails where a condition is annexed to a chattel personal or real, as a term for years; (1 Rol. 413, c. 20, 25); and a condition to a freehold may be referred to a matter not in writing, and may be supplied by averment, as if a corody be granted for life, *sic quod per A. prius usita* fuit, it may be averred that the corody of A. was upon condition to attend the master, &c.; (1 Rol. 413; 1. 50, id. l. 52). So, a condition precedent upon which an estate shall be created may be without deed. (Co. Lit. 216. a).

By implication.—An implied condition, or a condition in law, is that which may be legally inferred from the contents of the instrument, without express words being introduced, and is created by the common or statute law; as, if a party grant for the parkership of his park for life, a condition is implied that if he does not perform the duties incident to the office, the grantor and his heirs may oust him. (Lit. s. 371; Co. Lit. 232. b., 333). So, to the grant of every estate is annexed, by law, a condition implied, that the grantee shall not commit felony or treason. And Lord Coke says, there is a condition in law annexed to every estate tail, after possibility of issue extinct, estate by the curtesy, in dower, for life or years, that if the tenants of these estates respectively alien in fee, or claim in a court of law a greater estate than they are legally entitled to, they shall forfeit them, and the persons in remainder or reversion may enter. As to conditions in law founded upon statutes, they may be illustrated by the laws against mortmain, that the grantee of an estate shall not alien it to an ecclesiastical corporation; this may be deemed a statutory condition. So, by the Statute of Marlbridge, tenants for life and years hold their estates upon condition not to commit waste. Conditions founded upon implications in law are as binding and as operative as if they had constituted a component part of the express stipulations in the deed. (Lit. s. 371; Co. Lit. 232. b., 333. a).

By express words in a separate instrument.—The condition may be in the same deed, or indorsed upon the obligation or original instrument; (1 Rol. 431, l. 10); or may be contained in another deed. (1 Rol. 414). But where terms are introduced in a separate instrument to defeat the force and operation of another, or to affect an estate, it is called a defeasance, and not a condition. A condition to defeat a feoffment of land ought to be contained in the same instrument, or in another deed sealed contemporaneously with the charter of feoffment. (*Fowell v. Forrest*, E. T. 1669, K. B., 2 Saund. 48).

the manor of Chalcot, otherwise Calcot, in the county of Somerset. The said George Watt, in consideration of the rent and conditions hereinafter mentioned, is to have, hold, and occupy, as on lease, every part and parcel of all that piece or tract of turbary land, commonly called the Five Hundred Acres, situate in the said manor, which may be now in hand and disengaged or unlet, for the term of twenty-one years from Lady-day, 1825, at the yearly rent of 5*s.* an acre, payable quarterly, and free and clear of all charges, rates, and outgoings whatsoever; and is also to have, at the rent of 5*s.*, all and every parcel of the said five hundred acres which may fall in hand or become unlet between this time and the expiration of the said term of twenty-one years; provided always, that the entire or total quantity of land in the said five hundred acres, occupied by the said George Watt by virtue of this agreement, shall never exceed one hundred acres in the whole; and that the term or lease of all and every part occupied or possessed under this agreement shall cease or determine in twenty-one years from Lady-day aforesaid: and it is stipulated that no house, cottage, stable, or other substantial building, nor any parcel on which such building now stands, or may hereafter be erected, shall be included in or leased by virtue of this agreement; and it is further stipulated and agreed that the said George Watt shall take and occupy at the rent aforesaid every parcel of land in the said five hundred acres, as the same may fall in hand, without choice, exception, or refusal, until the total quantity amounts to one hundred acres as before mentioned, and also that the said George Watt shall, on possession, proceed to cultivate and improve every parcel as the same comes to his occupation, whether it be late or early in the said term of twenty-one years, in like manner or method as he uses towards the parcels of which he has immediate possession; and lastly, it is stipulated and conditioned, that the said George Watt shall not assign, transfer, underlet, or part with any part or parcel of the said lands or premises, otherwise than to his wife, child, or children. Dated this 24th day of October, 1825. Aldborough Henniker."

Per Cur.—A party may impose conditions by a parol contract, as well as by a contract under seal; and the question in each case is, whether the words are apt and proper to denote the condition. The common words are, "Provided always," which answer to the *ita quod* of the more ancient forms. Sometimes it was expressed by the phrase "so as," but no particular form of words is necessary; the main point being the manifesting of the intention of the parties to the contract, no matter by what words they express that intention. The words, however, to denote condition in a lease, so as to give a right of entry by reason of a forfeiture, must be the words of the landlord; and if he uses words which denote a condition, that will be sufficient. Now, let us apply those general principles to the present case: the tenant is to have the land in consideration of the rent and conditions thereafter mentioned. That is the expression which meets you at the outset; the terms are very loose afterwards, and are in some respects variable. These are "stipulated," "stipulated and agreed," and "stipulated and conditioned:" those words in the latter part of the demise being clearly the words of the landlord; the word "stipulated" alone would, we think, in this part of the instrument import a condition. But the matter is placed beyond a doubt; for the word "conditioned" is added.

III. TO WHAT ESTATE OR PERSONAL CHATTELS CONDITIONS MAY BE ANNEXED.

(a) TO WHAT ESTATES*.

(b) TO WHAT PERSONAL THINGS OR CONTRACTS†.

IV. AT WHAT TIME CONDITIONS MAY BE ANNEXED‡.

V. TO WHOM CONDITIONS MAY BE RESERVED, AND UPON WHOM BINDING.

(a) TO WHOM CONDITIONS MAY BE RESERVED§.

(b) UPON WHOM BINDING||.

* A condition may be annexed to an estate of inheritance freehold, or for years, or to a use; (Sav. 77); a grant of tithes; (1 Rol. 412, l. 53); a devise; (1 Rol. 412, l. 1, 25; Id. 27); a surrender to the lessor; (1 Rol. 412); a surrender of a copyhold; (1 Rol. 412, l. 17); or to a release or confirmation of an estate. (1 Rob. 412, l. 22).

† Every species of contract may be upon condition; (1 Rol. 413, l. 4); and restrictive conditions may be inserted in an attornment; (Co. Lit. 274. b.; 2 Co. 68 a; 9 Co. 85 b; 1 Rol. 612, l. 45); or in a charter of pardon, or in a letter of denization. (Co. Lit. 274. b). But a naturalization cannot be upon condition, for it is inconsistent with the idea of the absoluteness, purity, and indestructibility of natural allegiance; (Co. Lit. 129. a.); nor can a person resign upon condition; because it is a judicial act to which no condition can be annexed any more than an ordinary can admit, or a judgment be confessed upon condition; or a condition be released upon condition. (Co. Lit. 274; 9 Co. 85 b). A party cannot release a personal thing, as an obligation upon a condition subsequent, for a personal right being once suspended is perpetually extinguished. (2 Rol. Ab. 412, 940). But a bond may be released upon a condition precedent, for there the action is not suspended till the condition is performed, as where the release was of an obligation, with a proviso that he who released might enjoy 120*l.* due to J. S. at a day then to come, which being a condition precedent was holden valid. (Rol. Ab. 412).

‡ As to the time of annexing conditions there is a distinction to be observed between things executed and things executory: as concerns the former the condition must be created, and annexed to the estate at the time of the grant; hence, where a condition is made in a separate deed, it must be sealed and delivered at the same time with the principal deed; 1 Inst. 236 b; Touchs. 126; 3 Rol. Abr. p. 61; 2 Cruise, 3; 2 Saund. 48; 1 Bac. Abr. 634; as regards the latter, such as rents, annuities, &c., it is admitted as a clear principle, that payment of them may be restrained by a condition executed after the execution of such conveyance. (1 Inst. 237; Rol. Ab. 590; 1 Bac. Abr. 634).

§ A condition, or the benefit of a condition, can only be reserved to the donor, feoffor, or lessor, and their heirs, not to a stranger. For, in order to discourage maintenance, it is a maxim of law, that nothing which lies in action, entry, or re-entry can be granted over. And where, in the creation of a condition, no words of limitation are mentioned, the law will reserve the benefit of the condition to the heirs of the donor, feoffor, or lessor, for as these persons are prejudiced by the disposition, it is but reasonable that they should be entitled to the same means of recovering the estate as their ancestors. (See Lit. sect. 347; Co. Lit. 214; Rol. Ab. 407, 472).

|| Where an estate is devised to an infant on condition, he is bound to take notice thereof, and perform the condition. (*Williams v. Fry*, M. T. 1761, K. B., 2 Lev. 21; S. C. 3 Keb. 19; S. C. 3 Mod. 20; 1 Mod. 86, 300; Vent. 200). And if the condition be broken during his minority, the land is lost for ever. (*Whittingham's case*, 8 Co. 446; S. C. cited Hardr. 11). So, if an estate be made to a feme covert, she shall be bound by the condition, because this does not charge her person, but the land. (Br. Baron and feme, cites 45 E. 3, 12 D.; 28 H. 8, 13, s. 6; 5 Vin. Abr. 118).

VI. OF CONDITIONS PRECEDENT AND SUBSEQUENT*.

PARKER v. RAWLINGS, T. T. 1827. C. P. 4 Bing. 280; S. C. 12 Moore, 529.

In an action of assumpsit, the contract produced was:—"Sold Messrs. W. and S. B. Parker, one bale of New Providence sponge, weighing 1 cwt. 3 qrs. 21 lbs. gross, tare 8 lbs., lying in my warehouse, marked P. at 10s. per lb.; and bought of them yellow ochre, equal to sample, at 5*l.* per ton. The sample, which is marked B., to be delivered free alongside of the Lion wharf; the empty packages to be returned, and the ochre to be delivered on or before the 24th instant.

A contract stated the sale of sponge to the plaintiff, and the purchase of yellow ochre, to be delivered before a certain day:—Held, that the delivery of the ochre was a condition precedent†.

"April 6, 1826.

"Joseph Rawlings."

"To Messrs. W. and S. P. Parker."

It appeared that the plaintiffs had, in pursuance of the above contract, delivered ochre at various times, but not to the full amount of the sponge. They afterwards demanded the sponge, which the defendant refused to deliver. The remainder of the ochre was never delivered, but the defendant was requested to pay for that which had been delivered. For the defendant, it was insisted, that he was

* A condition precedent is such as ought to be performed before the estate vests, or grant, or gift, or contract takes effect. A condition subsequent is such as defeats an estate, gift, or contract by some subsequent act. Thus, if an estate be limited to A. upon his marriage with B., the marriage is a precedent condition, and till that happens no estate vests in A.; (Show, *Parl. Ca.* 83); or if a man make a lease of land to J. S. for ten years, provided that if he pay the lessor 10*l.* at Michaelmas, he shall have the land to him and his heirs, this is also a condition precedent, and must be fulfilled ere the estate can take effect. (*Shep. T.* 19). But where a lease is made for years, on condition that the lessee shall pay 10*l.* to the lessor at Michaelmas, or else his lease shall be void, this is a condition subsequent, for here the estate is executed, but its continuance depends upon the breach or performance of the condition. (*Ib.*) So, if a man grant an estate in fee-simple, reserving to himself and his heirs a certain rent, and that if such rent be not paid at the times limited, it shall be lawful for him and his heirs to re-enter and avoid the estate, in this case the grantee and his heirs have an estate upon condition subsequent, which is defeasible if the condition be not strictly performed. Conditions precedent, which are to create an estate, receive a liberal construction, and if the condition is performed as near to the intent as possible, it will be sufficient; but it is a rule, that conditions which defeat estates are to be construed strictly.

† A. and B. were litigant parties in several actions. C. was the attorney of B.; and at a meeting to settle the actions, it was agreed between A. and B., in the presence of C., *inter alia*, that C. should give his promissory note at two months, as a collateral security from B. to A. of a sum of 450*l.*; and it was added that all the effects which A. had of B.'s should be delivered up to C. as B.'s attorney: C. signed the note at the meeting immediately after the signing of the agreement:—Held, in an action on the note by A. against C., that the delivery up of the effects was not a condition precedent to the right of A. to claim the money. (*Irving v. King*, E. T. 1830, N. P., 4 C. & P. 309). Where it was part of a condition precedent to the claim of a sum of 80*l.*, in addition to the purchase-money for a new house, that the pavement in front of the adjoining houses should be laid down by the 21st of April:—it was held that the delay of four days, though occasioned by bad weather, which prevented the workmen from proceeding, was sufficient to prevent the recovery of such claim. (*Maryon v. Carter*, H. T. 1830, N. P., 4 C. & P. 295). In an action by vendee for non-delivery of goods:—Held, that, in an agreement "for the delivery of goods on arrival, to be delivered with all convenient speed, but not to exceed a given day," the arrival in time for delivery by that day is a condition precedent; and if they do not so arrive (without default in vendor) the agreement is null. (*Alewyn v. Pryor*, T. T. 1826, N. P., 1 R. & M. 406).

not bound, by the terms of the contract, to deliver the sponge until he had received the whole of the ochre. Verdict for the defendant. On motion to set it aside—

Per Cur.—This was, in effect, a contract on the part of the plaintiffs to receive the sponge, and pay for it with ochre instead of money; no precise time was fixed for the delivery of the sponge, but the 24th of April was fixed for that of the ochre, thus making the delivery by the plaintiffs a condition precedent to the delivery by the defendant. The plaintiffs themselves, by having delivered a part of the ochre, seem so to have understood it; and as they did not fulfil their part of the agreement, they were properly nonsuited. Rule refused.

MECHELEN *v.* WALLACE, E. T. 1836. K. B. 6 N. & M. 316.

So, under a contract for £— rent for a house, to be suitably furnished:—Held, that the furnishing was a condition precedent to the payment of rent.

THE plaintiff took a house for a ladies' school at the rent of 170*l.* per annum, to be furnished, and the agent pledged himself that the house should be furnished in a manner to make it suitable for a ladies' school. On the 25th day of August the plaintiff took possession of the house, under the verbal contract above stated, and on the 26th a written agreement for a tenancy was tendered to him for execution, which, however, he refused to sign. On the same day he addressed a letter to the agent, in which he complained that that person, upon whose honour he had entirely relied in taking the house, had not performed his stipulations; that the house was indifferently furnished, and inadequately to the rent to be paid for it, and that he could not be expected to sign any agreement until the house was properly completed. The rent not being duly paid, in November following the plaintiff distrained for 42*l.* 10*s.*, being the sum due for one quarter, and for this distress an action of trespass was brought for breaking and entering the plaintiff's house. The jury found for the plaintiff. On motion for a new trial—

Per Cur.—The acts to be performed by the landlord constituted a condition precedent to the payment of rent; they were to be done previously in point of time; he had no right to distrain; the action may be maintained. Rule refused.

KEMBLE *v.* MILLS, H. T. 1841. C. P. 2 Scott, N. S. 121; S. C. 9 D. P. C. 446; S. C. 1 M. & G. 757.

But a condition in a contract, not tending to avoid the entire consideration, will not be deemed a condition precedent.*

THE plaintiff declared in assumpsit upon articles of partnership entered into between him and the defendant, by which the defendant undertook to pay to the credit of the concern 5000*l.*; the plaintiff undertook to pay 2000*l.*, or thereabouts, and to make certain arrangements with regard to the premises in which the business was to be carried on: the agreement then provided, that, if the plaintiff brought in less than 2000*l.*, the residue of that amount should be made up from the profits accruing due to him out of the business; that after the 2000*l.* had been so paid, a further sum of 3000*l.* should be paid by the plaintiff, either in money or by the

* Where the question is, whether conditions are concurrent only, or dependent, the Court will be governed by the apparent intention of the parties; and when concurrent, it will be sufficient to aver that the party is ready and willing, and of which the other had notice. (*Kemble v. Mills*, C. P., 2 Scott, N. S. 121; S. C. 9 D. P. C. 446; S. C. 1 M. & G. 757; *Abr.*, *supra*).

deduction of one-third of his profits; that a license should be obtained by the plaintiff at his own expense; that the banker's account should be under the control of the defendant, as well as the employment of the clerks and servants, and the regulation of the general business accounts. The declaration then averred the plaintiff's readiness and willingness well and truly to keep his part of the contract, and the performance of certain acts in pursuance of its provisions, but alleged that the defendant had not paid the 5000*l.* into the concern, in pursuance of the agreement. The defendant pleaded that the plaintiff had not procured the said license, and had not paid the said 2000*l.* into the concern at any time before the commencement of the suit. On demurrer—

Per Cur.—If, in an agreement, a condition does not go to avoid the entire consideration, it will not be construed as a condition precedent, unless the intention of the parties is clear to that effect; and, therefore, the procurement of the license, and the payment of the 2000*l.*, were not conditions precedent to the payment by the defendant of the 5000*l.*

VII. OF DISJUNCTIVE CONDITIONS*.

VIII. OF THE MANNER IN WHICH CONDITIONS ARE TO BE CONSTRUED†.

* The characteristic quality of these conditions is defined in the term by which they are known. When the condition is disjunctive, he who ought to do the first act shall have an election to do the one or the other; (Co. Litt. 145. a.); as if it be to enfeoff land, to pay gold or silver, to deliver one thing or another, the obligor has an election to do the one or the other; (1 Rol. 446, l. 20); so, if it be to enfeoff, pay &c., at the request of the obligee, for his request only ascertains the time of the doing it; (1 Rol. 446, l. 25-30; 467, l. 5); so, if it be to do it at Michaelmas at his request, or at the feast of Easter, (1 Rol. 446, l. 40): but where the disjunctive goes only to the time, and that is referred to the request of the obligee, it gives the election to him; as to do at Michaelmas, or before, at the request of A. (1 Rol. 446, l. 35-37). If a condition be in the copulative, but is impossible to be so performed, it shall be taken in the disjunctive; as if it be that A. and his heirs or executors do such a thing; (21 E. 4, 44; 1 Rol. 444, l. 26); or that A. and his assigns do perform it. (1 Rol. 444, l. 25).

There is a difference between what is denominated disjunctive *absolute* and disjunctive *contingent*: as, if a man be bound to pay 10*l.*, or to enfeoff a party upon the return of J. S. from Rome, if J. S. die before he returns from Rome, the obligation is saved, though the 10*l.* be never paid; but if it is a voluntary act, as to pay 10*l.*, or enfeoff you before Michaelmas, then, if the obligor dies before Michaelmas, yet his executors ought to pay the money—per Popham, C. J. (Goldsb. 192, pl. 141).

† A condition, from which the intent of the parties can be collected, is good, notwithstanding the most gross incorrectness in language. (*Cromwell v. Grimsden*, E. T. 1698, K. B.; 1 Ld. Raym. 335; S. C. 1 Salk. 462; Com. 447; S. C. Holt, 522; 4 Mod. 281; S. C. 12 Id. 193). The words of a condition are liberally expounded to carry into effect the intention of the parties; as if the condition of an obligation be, whereas A. will surrender a copyhold to B., if they so long live, then the obligation will be void; it shall be part of the condition that A. make the surrender. (1 Rol. 409, l. 30). So a condition, that if A. discharge a recognisance, and whereas he has agreed to free the obligee from two bonds, the condition is, that if he save him harmless from the said two bonds, then &c. it extends to the recognisance as well as to the two bonds. (1 Rol. 409, l. 40). So, a condition to perform all articles in the indenture does not extend to land excepted out of the lease, though it be mentioned in the indenture. (1 Rol. 431, l. 25).

IX. OF INVALID CONDITIONS.

(a) BY BEING ILLEGAL.

1. *At Common Law**.2. *By Statute*†.

(b) BY BEING REPUGNANT‡.

* The condition must not be *malum in se*; (*Carpenter v. Beer*, E. T. 1694, K. B., Comb. 246); but a condition in a bond to pay a pregnant woman a certain sum to save the putative father harmless is not immoral nor illegal. (*Briggs v. Mond*, H. T. 1697, C. P., 1 Lutw. 667). A condition in a bond, operating in restraint of marriage, is void; (*Low v. Peers*, 4 Burr. 2225; see 4 Burr. 2052; 19 Ves. 1; 5 Ves. 117; 2 Stra. 1128); and the same rule applies to one given to procure a marriage. (*Hall v. Hearne*, 3 Lev. 411; S. C. Show. 76; S. C. Bro. P. C. 144). A bond conditioned to commit maintenance is void; (see Hob. 304; Hut. 40; 1 Roll. Abr. 427); or not to give evidence, is illegal. (*Masen v. Watkins*, M. T. 1688, C. P., 2 Vent. 109). A condition in a bond, that the obligor shall remove himself and his family from a particular parish, and not return to live therein as an inhabitant without permission from the obligee, is legal; (*Shelton v. Sire*, M. T. 1724, K. B., 11 Mod. Rep. 310); but a bond conditioned to render in execution a person who has already been discharged from execution for the same cause is void. (*Da Costa v. Davis*, E. T. 1798, C. P., 1 B. & P. 242).

† If the condition in a bond be to do an act in contravention of any statute, it will be void. (Vide *Analysis*, ante, p. 654).

‡ *With the Estate*.]—Being repugnant to the nature of the estate to which it is annexed is bad. So, a feoffment in fee, upon condition that the feoffee shall not take the profits, is void, as being repugnant and against law, and the estate given is absolute. (1 Inst. 206). So, where a lease was made to A. B., and with a proviso that if C. should demand any profits of the lands, or enter into the same during the life of A. or B., (who were his father and mother), that then the estate limited to C. should cease, and be utterly void, it was resolved that this was a condition, and was void, being repugnant to the estate limited; (see *Moor v. Savill*, 2 Leon. 132); but Littleton says, if the condition be such that the feoffee shall not alien to such a one, naming him, or to any of his heirs, which does not take away all power of alienation, then such condition is good. (1 Inst. 223, a.). Whatever is prohibited by law may be prohibited by a condition; therefore, if a feoffment be made in fee, upon condition that the feoffee shall not alien in mortmain, this is a good condition, because such alienation is prohibited by law. (1 Inst. 223, b.). So, if lands be given in tail, on condition that neither the tenant in tail nor his heirs shall alien in fee or in tail, or for the term of another's life, but only for their own lives, such a condition is good, because these alienations are contrary to the statute De Donis, tit. 2, c. 2. (Lit. sect. 362). So, if a person make a gift in tail, upon condition that the donee shall not make a lease for three lives, or twenty-one years, according to the statute 32 Hen. 8, the condition is good; for this power being given collaterally is not incident to the estate, and may therefore be restrained by condition; (see 1 Inst. 223, b.); but if an estate be created, with a condition that the tenant in tail shall not suffer a common recovery, the condition is void, because the right to suffer a common recovery is an incident inseparably annexed to an estate tail. (Ib.) Lord Coke (1 Inst. 206, b.) says, although a condition repugnant to the nature of the estate granted is void, yet that in all such cases a bond, by which the obligor is restrained from doing that which the nature of the estate granted entitled him to do, will be good; thus, if a feoffee in fee becomes bound in a bond not to take the profits of the land, or not to alien the estate, such a bond would be good; (2 Inst. 206, b.); as where A. made a settlement of his lands on his son in tail, but took a bond from him not to sink the entail: on a bill to be relieved, it was ruled that the bond was good, and the bill dismissed with costs, though the alienation was made by the issue; for if the son had not agreed to give the bond, the father might have made him only tenant for life. (See 2 Vern. 235). The preceding doctrine seems questionable, as it offers an obvious mode of restraining a person from exercising those rights over an estate which the common law gives him,—consequently, of frustrating the common law; (see Moore, 810); as where A. settled lands on B. in tail, with remainder to his right heirs, and took a bond from B. not to commit waste, the bond being put in suit, it was directed to be delivered up to be cancelled, the Court saying it was an idle bond. (2 Vern. 25).

- (c) BY BEING IMPOSSIBLE*.
- (d) BY BEING UNCERTAIN†.
- (e) OF THE CONSEQUENCES OF VOID CONDITIONS‡.
- (f) OF CONDITIONS PARTLY VOID AND PARTLY VALID§.

X. OF THE PERFORMANCE OF CONDITIONS||.

BRYANT v. BEATTIE, E. T. 1837. C. P. 4 Bing. N. S. 254.

THE occupier of an hotel not having obtained a wine license, and being about to quit and transfer the premises to the defendant, had deposited a sum as an indemnity for the expense of procuring the license, and duly attended the meeting of the magistrates for that purpose, and which would have granted but for the non-attendance of the defendant.

A party cannot take advantage of the non-performance of a condition arising from his own neglect.

The Court held, as a case within the 12th sect. of the 9 Geo. 4, c. 61, it was the duty of the defendant to have given the notices required by the act, and that he could not take advantage of the non-performance of the condition occasioned by his own neglect, and that the plaintiff was entitled to recover back the sum deposited.

With other parts of the same deed, or in itself.—Whether words in the condition of a bond, which are repugnant to the plain intent of the parties, will be rejected, seems questionable; (*Prideaux v. Roberts*, M. T. 1728, C. P., 1 Com. 231); and where a bond dated in March conditioned for payment super vicesimum octavum diem Martii proximum sequentem, the Court, on motion by the defendant in arrest of judgment, held it payable in the current month. (*Lister v. Stanley*, E. T. 1674, K. B., 1 Mod. 112; S. C. 3 Keb. 291).

* A condition for the obligor to go to Rome the next day, (Co. Lit. 206; Say. 96; Leon. 189; 14 E. 4, 3), or that the obligor shall assign to the obligee a commission of bankrupts, is an impossible condition and therefore void. (Rol. Abr. 419). But, if a woman makes a feoffment to a man that is married to another upon condition that he shall marry her, this is a good condition, for his wife may die, and then he may marry her. (Bro. tit. *Condition*, 420). If the condition of a bond be duplex, the impossibility of performing one part is no justification of non-performance of the other. (*Da Costa v. Davis*, E. T. 1798, C. P., 1 B. & P. 242).

† An uncertainty in the condition of a bond may be supplied. (*Holmes v. Joy*, T. T. 1678, K. B., 2 Show. 16).

‡ A defendant cannot take advantage of a void condition in a bond without praying over and pleading it; (*Colton v. Goodridge*, T. T. 1776, C. P., 2 Blac. 1108); and if the condition be repugnant, (*Wells v. Fergusson*, M. T. 1708, K. B., 11 Mod. 198; S. C. 2 Salk. 463), or impossible, (*Wall v. Grovet*, M. T. 1700, K. B., 12 Mod. Rep. 418), the bond becomes single.

§ A void condition in a bond does not affect the whole bond. (*Newman v Newman*, E. T. 1815, K. B., 4 M. & S. 66; S. P. *Chesman v. Nainby*, H. T. 1726, K. B., 2 Lord Raym. 1459; S. C. 1 Stra. 739; S. P. *Lying v. Paine*, T. T. 1745, C. P., Willes, 574).

|| *By whom.*—It is a general principle that the person to be discharged is bound to do the act which is to effect his exoneration. (*Cranley v. Hillary*, M. T., 1813, K. B., 2 M. & S. 120). Hence, it is laid down by *Littleton*, (sect. 340), that the obligor of a bond conditioned for the payment of money at a particular day is bound to seek the obligee, if he be in England, and at the set of day to tender him the money, otherwise he shall forfeit the bond.

To whom.—In debt on bond conditioned to deliver forty pairs of shoes within a month at H. B. to H. K., a common carrier to G., for the use of the obligee; plea, that in all that space of a month H. K. did not come to London, but that

XI. OF THE BREACH OF CONDITIONS.

(a) WHAT CONSTITUTES A BREACH IN GENERAL*.

on such a day at H. B. he delivered forty pairs of shoes to A. G., the carrier's servant, is good. (*Staples v. Alden*, T. T. 1678, C. P., 2 Mod. Rep. 309). So, if the condition of a bond be to pay 10*l.*, &c. it is a good performance if he pays it to his deputy; (42 E. 3, 136; Rol. Abr. 421). So, if he be to pay 10*l.* per annum after the death of the obligee to the executors of the obligee for the use of his children, and he die without making any executors, the money shall be paid to his administrator. (West, 115; Lit. Rep. 156). But, if a man be bound to pay 20*l.*, upon condition to pay 10*l.* to such person as the obligee shall name by his last will, and the obligee does not name a person by his will, the obligor is not bound to pay it to his executors, because the condition has reference to his nomination; (Rol. Abr. 421; and see Coke in Moor, 855). There is a diversity where the condition is to pay 10*l.* to the assignee of the obligee, and where to the obligee or his assigns, for in the last case it vests as a duty in the obligee and shall go to his executors.

At what time.—A condition to do within the space of one month such further act or acts as the obligee shall demand, and no demand is made within the month after the making of the obligation, yet the obligor is bound to do them within a month after request made, although a month has passed since the making of the obligation. (*Wentworth v. Wentworth*, H. T. 1650, K. B., Sty. 262; S. C. Rol. Abr. 441). So, if the condition is to pay 50*l.* upon the 10th of January next on three months' warning, the obligor must pay the money upon the 10th of January next, giving the obligee three months' warning, for the words shall be taken most strongly against the obligor. If a condition be to do a single personal act, the obligor shall have the whole of his life to perform it; (Co. Lit. 208-9); and shall not be bound to do it on request. (Co. Lit. 209. a.). And if a condition be to do a local thing to the feoffor or obligee himself, he has time during life, unless he be hastened by request; as if a feoffment or obligation be upon condition that he re-enseff the feoffor or obligee. (Co. Lit. 208. b.; 1 Rol. 438, I. 15, 40; Co. Lit. 219. a., 220. a.). So, if it be that he re-enseff the feoffor and a stranger; (Co. Lit. 219. b.); or regrant to the feoffor in tail, remainder to a stranger. (*Ibid.*). So, if a devise be to A., upon condition that she marry B., time shall be allowed to A. to marry at any time during her life. (Per *Holt*, Skin. 320). So, if a devise be to A. upon condition that A. marry B. before her age of twenty-one years, and B. dies before such age, A. shall have the land till her age of twenty-one years. (*Ibid.*). But where a condition is to do a transitory thing without limiting any time, it ought to be done immediately, viz. in convenient time; as an obligation to pay money, to deliver charters, &c. (Co. Lit. 208. a.; 1 Rol. 436, I. 15 to 35).

At what place.—If the condition of an obligation be to pay money to the obligee at a day certain without limiting any place, the obligor is to seek out the obligee if he be within the realm. (Lit. s. 340). So, if a feoffment be upon such condition; for it is a sum in gross and collateral to the land. (Lit. s. 340; 1 Rol. 445, I. 30, 40). So, if a condition be, that a stranger shall shew a deed to his counsel upon request, and after request made the stranger ought to seek out his counsel. (1 Rol. 443, I. 35). But, if a condition be to deliver, for instance, corn, timber &c., the obligor before the day ought to inquire where the obligee will appoint the delivery; (Co. Lit. 210. b.; 1 Lev. 46). If a condition be to pay rent, it is sufficient that it be tendered or paid upon the land. (Co. Lit. 210. b.).

What a sufficient performance.—A condition to leave the obligee a third part of his estate, is not performed by the obligor making the obligee a joint executor with two other persons. (*Impey v. Pit*, T. T. 1679, K. B., 2 Show. 69; S. C. T. Jones, 133). For if a condition be to do a thing, the party ought to do all that which depends upon the performance; (1 Rol. 422, I. 45); as if a condition be to stand to an award concerning a partition, if it awards a partition, and that he levy a fine for confirmation, he ought to levy the fine; for it depends upon the partition and enforces it. (1 Rol. 433, I. 47). So he ought to perform it strictly, as if a condition be to enter a *retraxavit*, and he discontinues, it is not a performance. (1 Rol. 426, I. 32). So, to appear at the suit of such a one in K. B., and he appears there the same term in another suit, though this be an appearance in law, it is not a performance. (1 Rol. 426, I. 40).

* A bond to sue with effect is not forfeited by procuring an injunction. (*Duke of Ormond v. Ireland*, M. T. 1699, K. B., 12 Mod. Rep. 320, 321). But a bond

(b) WHEN A NOTICE IS NECESSARY*.

(c) WHEN A REQUEST IS NECESSARY†.

(d) WHEN A TENDER AND REFUSAL ARE NECESSARY‡.

XII. OF EXCUSING THE NON-PERFORMANCE.

(a) ON ACCOUNT OF THE ACT OF GOD §.

(b) ON ACCOUNT OF THE ACT OF LAW ||.

(c) ON ACCOUNT OF THE ACT OF THE PARTY ¶.

payable by instalments becomes forfeited by non-payment of the first instalment. (*Webb v. Dwight*, M. T. 1734, K. B., 7 Mod. Rep. 191; S. C. 2 Mod. 285, by the name of *Wells v. Wright*). A bond conditioned to pay when such a bill of costs should be stated by two attornies, indifferently to be chosen between the parties, is forfeited by one of the parties refusing to appoint an arbitrator. (*Otway v. Holdips*, M. T. 1677, C. P., 2 Mod. Rep. 266).

* Notice of performance is necessary where there is a contingent condition. (*Anon.*, M. T. 1702, K. B., 7 Mod. Rep. 64). To be given by the obligor on a bond payable three months after warning. (*Lawson v. Widdrington*, M. T. 1662, K. B., 1 Lev. 85; S. C. 1 Keb. 380, 415).

† A request is requisite where there is no duty until demand. (*Harwood v. Tuberville*, T. T. 1704, K. B., 6 Mod. Rep. 200). As on a condition to grant an annuity within six months after the death of A., or on his refusing so to do to pay 300*l.*, the obligee is bound to make a request of a deed of annuity within the time specified. (*Basket v. Basket*, H. T. 1675, C. P., 2 Mod. 200; S. C. 1 Mod. 264; S. C. 1 Freem. 228). So, if a master bind himself to do an act at a particular time, if requested by his apprentice, he is not bound so to do unless a request be made. (*Fitzhugh v. Dennington*, M. T. 1703, K. B., 6 Mod. 227, 259; S. C. 3 Salk. 309; S. C. 2 Salk. 585; S. C. Holt, 68; S. C. 2 Ld. Raym. 1074).

‡ On a condition to execute a deed, the defendant, to save the forfeiture, must tender the deed. (*Baker v. Bulstrode*, H. T. 1673, K. B., 1 Mod. Rep. 104; S. C. 2 Lev. 95; S. C. 2 Danv. 39; S. C. 3 Keb. 273; S. C. Raym. 232; S. C. 1 Vent. 255). So, under a condition to exhibit an inventory in the spiritual court before such a day, the defendant, in excuse, must not only plead that no court was held, but also that he was there ready. (*The Archbishop of Canterbury v. Willis*, M. T. 1767, K. B., 2 Ld. Raym. 172).

§ A condition rendered impossible by the act of God, (*Thomas v. Howell*, T. T. 1692, K. B., 1 Salk. 170; S. P. *Anon.*, M. T. 1679, C. P., 1 Salk. 170), is an excuse for its non-performance; as, if a ship be lost by stress of weather. (*Pim v. Elliott*, M. T. 1681, K. B., Skin. 3). And when a condition is in the disjunctive, if one part of the condition becomes impossible by the act of God, (S. P. *Laughter's case*, 5 Co. 21), (the obligor is not bound to perform the other part). *Sparrow v. Sougate*, W. Jones, 29, cited in *Weddall v. The Manucaptors of Jocar*, 10 Mod. Rep. 268; S. P. *Shipley v. Chappell*, T. T. 1688, K. B., 3 Mod. 233).

|| The performance of a condition may be excused by an act of law, which is necessary and inevitable; as, if a condition be that the feoffee pay so much out of the profits annually to charitable uses; if he dies, and his heir be in ward to the king, the payment shall be excused; for it ought to be out of the profits which are transferred by act of law to the king. (See 1 Rol. 451; Cro. Jac. 374; Roll. Rep. 198; 3 Bulst. 55). But if the condition be, that he shall be his attorney in all pleas, and he is made sheriff, that does not excuse him. (See 1 Rol. 451).

¶ The performance of a condition may likewise be excused by an act of the parties; as if the obligees neglect to comply with the condition, it is a discharge of the obligation. (*Basset v. Basset*, H. T. 1676, C. P., 1 Mod. 264; S. C. Freem. 228). So, if the condition of a bond be that the obligor shall enfeof the obligee of the land before such a day, and after, before the day, the obligee dispossess the obligor, and keep it by force till after the day, so that the obligor cannot enter, this will excuse the performance of the condition. (See 8 Co. 92; Co. Lit. 206). So, if a man be bound to build a house, &c., he is excused if the obligee will not suffer him to build it; for he cannot come on the land against his will. (See Rol. Abr. 453; 9 H. 44; 3 H. 6, 37; Rol. Abr. 454).

(d) ON ACCOUNT OF THE ACT OF A STRANGER.*XIII. OF THE REMEDIES FOR NON-PERFORMANCE,
AND WHO ARE ENTITLED TO TAKE ADVAN-
TAGE OF THEM†.

Conditional Abandonment. See tit. *Insurance.*

Conditional Legacy. See tit. *Legacy.*

* The non-performance of a condition shall not be excused by the act of a stranger; (*Butcher v. Nane*, M. T. 1666, K. B., 1 Lev. 191; S. C. 1 Sid. 313); as if the condition be to deliver goods, and a stranger intercepts them; (1 Rol. 451); or that a man shall appear, and a stranger imprisons him; (*Ibid.*); it does not excuse the performance. So, if a condition be to do a thing to a stranger, who refuses to accept it; (1 Rol. 452; see Lit. 13; 1 Rol. 457); as if the condition be that the son of the obligor shall marry the daughter of the obligee, if the daughter of the obligee refuse the son, yet the condition is forfeited; for the daughter is a mere stranger, and the obligor has taken on him that his son shall marry her. (Hutt. 48; Hench. 30; 3 Bulst. 30; see 19 H. 6; Co. Lit. 209; 1 Leon. 266; 2 Leon. 222; Rol. Abr. 453; 5 B. & Ald. 917). But if A. dis-
seises B., and after leases to C. for years, and C. covenants at the end of the term to leave and yield up the tenements well repaired to A., and after B. enters, &c., C. is excused. (Cro. Eliz. 656; see 5 Co. 23; Cro. Eliz. 716; Moor. 645; Lit. Rep. 13; Hench. 26).

† A condition to a feoffment, &c., may give an entry generally, or a special entry, as till he be satisfied, &c. If a condition be that he shall enter and hold the land till he be satisfied, he shall have the land only in nature of a distress. (Lit. s. 327). If a condition be that he shall have the land till he be thereof satisfied, or words which are tantamount, the profits shall be in part of satisfaction. (Co. Lit. 203. a.). But where a condition is, that he shall have the land till he be satisfied the rent to be paid, without saying thereof, or to the same effect, the profits do not go in satisfaction, but shall be taken to his own use, as a penalty to enforce the payment. (Co. Lit. 203. a.). If rent be granted with a condition, that if it be in arrear, the grantee, his heirs, and assigns, may enter and hold the land till satisfied by the profits, the assignees may enter and hold till satisfaction; (R. 1 Sand. 112); and the grant is good, though the deed be not enrolled; for this uncertain interest may attend a certain and fixed estate. (R. 1 Sand. 112; 1 Sid. 344). So, if the grant be by deed, with a covenant to levy a fine, which is levied of the land accordingly, the assignee of the rent shall take advantage of the condition, which shall be transferred with the rent, though it was only a possibility. (R. 2 Rol. 48, l. 45). But if a man purchases the manor of D., and has other land conveyed, as a collateral security, to the use of the vendor and his heirs, and till the purchase be evicted by his wife, and then to the use of the purchaser, his heirs and assigns, till satisfied the damage had by such eviction; if he assigns the manor of D., the assignee, being evicted, cannot enter into the land; for the use being contingent was not assignable before it happened. (R. 2 Rol. 40, j. 5, n.). It is a general rule, that a party who enters for a condition broken shall be possessed of the same estate and interest as he was prior to the creation of the interest destroyed by the non-performance of the condition; (Co. Lit. 202; Rol. Abr. 474); as if a feoffment is made to A., upon condition for the non-payment of certain rent to re-enter, and A. dies, leaving a wife, after which the condition is broken by the heir of A., the feoffor shall re-enter, and defeat the title of dower that accrued to the wife of the feoffee. (22 E. 19; Fitz. Conditions, 14; S. C. Rol. Abr. 474).

Conditional Sale. See tit. *Sale*.

Confederacy. See tit. *Conspiracy*.

Confessions and Admissions.

(See tit. *Dying Declarations*).

I. RELATIVE TO CIVIL PROCEEDINGS.

(a) AS TO CONFESSIONS AND ADMISSIONS BY WRITTEN DOCUMENTS.

1. *In general*. See tit. *Evidence*.
2. *In particular Cases*.
 1. *Certificates*. See tit. *Settlement*.
 2. *Deeds*. See tits. *Bonds—Covenants—Deeds—Leases*.
 3. *Devisees and Bequests*. See tit. *Will*.
 4. *Judgments*. See tit. *Judgment*.
 5. *Marriage*. See tit. *Marriage*.
 6. *Nuisance*. See tit. *Nuisance*.
 7. *Particulars of Demand*. See tit. *Particulars of Demand*.
 8. *Payment of Money into Court*. See tit. *Payment of Money into Court*.
 9. *Pleas*. See tit. *Pleas*.
 10. *Receipt*. See tit. *Receipt*.
 11. *Set-Off*. See tit. *Set-Off*.
 12. *Tender*. See tit. *Tender*.
 13. *Tithes*. See tit. *Tithes*.
 14. *Treason*. See tit. *Treason*.

(b) AS TO CONFESSIONS AND ADMISSIONS BY INDIVIDUALS.

1. *In general*. See tit. *Evidence*.
2. *In particular*.
 1. *Agent*. See tit. *Principal and Agent*.
 2. *Arbitrators*. See tit. *Arbitration and Award*.
 3. *Assignees*. See tits. *Bankrupt—Covenant—Lease*.
 4. *Attornies*. See tit. *Attorney*.
 5. *Bankrupt*. See tit. *Bankrupt*.
 6. *Baron and Feme and Persons cohabiting as such*. See tit. *Husband and Wife*.

7. *Conspirators.* See tit. *Conspiracy.*
8. *Covenanters.* See tit. *Covenant.*
9. *Executor and Administrator.* See tit. *Executor and Administrator.*
10. *Factors.* See tit. *Principal and Agent.*
11. *Farmers of Excise.* See tit. *Excise and Customs.*
12. *Guardians.* See tits. *Guardian—Trustee.*
13. *Infants.* See tit. *Infants.*
14. *Partners.* See tit. *Partners.*
15. *Rectors.* See tit. *Ecclesiastical Persons and Tithes.*
16. *Sheriff.* See tit. *Sheriff.*
17. *Sureties.* See tit. *Surety.*
18. *Trustees.* See tit. *Trustee.*
19. *Undersheriff.* See tit. *Sheriff.*
20. *Witnesses.* See tit. *Witnesses.*

II. RELATIVE TO CRIMINAL PROCEEDINGS.

- (a) WHEN VOLUNTARY, p. 668.
- (b) WHEN NOT VOLUNTARY, p. 669.
- (c) BY WHOM TO BE MADE.
 1. *By Principals*, p. 670.
 2. *By Accomplices*, p. 670.
- (d) EFFECT OF, p. 670.
- (e) HOW PROVED, p. 670.
- (f) PRISONER'S RIGHT TO COPY OF, p. 670.



II. RELATIVE TO CRIMINAL PROCEEDINGS.

- (a) WHEN VOLUNTARY*.

* A confession the day after an inducement has been offered, is voluntary; and therefore admissible against the prisoner. (*Rex v. Richards*, 1832, N. P., 5 C. & P., 318). And a confession in answer to questions put by a magistrate without threat or promise, is evidence. (*Rex v. Ellis*, 1826, N. P., 1 R. & M. 432). And where a promise has been made, but afterwards withdrawn, a subsequent confession is admissible. (*Rex v. Clewes*, 1830, N. P., 4 C. & P. 221). To exclude confessions the inducement must be made or sanctioned by a party having some authority. (*Rex v. Taylor*, 1839, N. P., 8 C. & P. 733). Where the prisoner made a confession to a magistrate, after the persuasions of a clergyman, but not with any view of temporal benefit, and after caution that it would be probably given in evidence against him. (*Gilham's case*, 1 Moody, C. C. 186). Or where a prisoner handcuffed, saying (after a recommendation to confess, in the absence of the prosecutor, and that they would do all they could for him) that if the handcuffs were taken off he would shew where all the property was:—Held admissible. (*Rex v. Green*, 1834, N. P., 6 C. & P. 635). So, where after promises held out by persons not examined, the magistrate told the prisoner that his confession would do him no good, and he afterwards made a statement, which

(b) WHEN NOT VOLUNTARY*.

was taken down :—Held, that it was not to be considered as made under the former influence, and was admissible. (*Rex v. Howes*, 1834, N. P., 6 C. & P. 404). And where parties in custody at the time of the inquest in a case of murder, were examined by the coroner on oath without inducement, and expressing their wish to be examined, their depositions are evidence. (*Reg. v. Owen and Others*, 1839, N. P., 9 C. & P. 83). So, a statement made before the magistrate at the first hearing, although not taken down, and on the final one the prisoner had declined saying anything :—Held, receivable in evidence, and not to be excluded by reason of the magistrate's neglect in not returning what had been said. (*Rex v. Wilkinson*, 1838, N. P., 8 C. & P. 662). And where it appeared that before a statement made by a prisoner before the magistrate, he was sworn by mistake, but as soon as it was discovered the deposition was destroyed, and the party cautioned :—Held, that his subsequent statement was receivable. (*Rex v. Webb*, 1831, N. P., 4 C. & P. 564). So, where the constable who had charge of the prisoner left the room, and shortly after the constable to whom the prisoner made the statement entered, the Judge refused to receive the statement without calling the other constable to negative any promise or threat, as otherwise it might lead to collusion by constables ; but it appearing that the prisoner was not under charge at the time, but detained only as an unwilling witness, the Court received the statement, without previously calling the other constable. (*Rex v. Swatkins*, 1831, N. P., 4 C. & P. 548). And where the prosecutor before the magistrate on a charge of forgery, said he considered the prisoner as only the tool of another, and the magistrate told the prisoner to be sure to tell the truth :—Held, that the statement then made was receivable. (*Rex v. Court*, 1836, N. P., 7 C. & P. 486). But where the prisoner, whilst unsuspected, had been examined as a witness on oath, and therein referred to a letter then produced :—Held, that as the examination not being perfectly voluntary could not be produced against the prisoner when charged with the offence, nothing said as to such letter before the magistrate could be received ; neither would the Judge (*Gurney B.*) receive evidence of what was said but not taken down, nor parol evidence of the contents of such examination. (*Rex v. Lewis*, 1833, N. P., 6 C. & P. 161 : *S. P. Rex v. Davis*, 1833, N. P., 6 C. & P. 178). And the prisoner's statement reduced into writing, before the witnesses against him had been examined, admitted per *Garrow, B.*, with great doubt of its legality. (*Rex v. Fagg*, 1831, N. P., 4 C. & P. 566). But, where before the prisoner's examination was taken, he was told not to say any thing to prejudice himself, as it would be used for or against him :—Held, (per *Coleridge, J.*) that the examination was inadmissible. (*Reg. v. Drew*, 1837, N. P., 8 C. & P. 140).

* There is a difference of opinion amongst the Judges as to receiving evidence of confession where an inducement has been held out by persons having authority, and where by persons having none. (*Rex v. Spencer*, 1837, N. P., 7 C. & P. 776). Where a promise or threat has been held out, the effect is always to exclude a confession or statement made to the person so holding out the promise or threat, (*Rex v. Dunn*, 1831, N. P., 4 C. & P. 543), unless the usual caution has been given to the prisoner by advising him to make no disclosure. (*Rex v. Green*, 1832, N. P., 5 C. & P. 312). After a threat by the captain of a ship to a prisoner, a mariner on board, upon the stolen property being found, that, "if he did not tell him who was his partner he would commit him to prison as soon as he got to N.," (*Rex v. Parratt*, 1831, N. P., 4 C. & P. 570) ; or where a surgeon called in to attend on a case of poisoning, told the prisoner she was suspected, and had better disclose what she knew ; (*Rex v. Kingston*, 1830, N. P., 4 C. & P. 387) ; or where the constable had said to the prisoner, "You had better not add a lie to the crime of theft," and then desired him to go with another constable and shew where he had put the things ; (*Rex v. Shepherd*, 1836, N. P., 7 C. & P. 579) ; or where it was said to the prisoner, "It would have been better if you had told at first ;" (*Rex v. Thomas*, 1833, N. P., 6 C. & P. 363) ; or a confession, after being told by the constable, "It is of no use for you to deny it, for there are A. & B., who will swear they saw you do it :"—Such statements render the confessions inadmissible. (*Rex v. Miles*, 1833, N. P., 6 C. & P. 145). So, where the witness said, "You had better split than suffer for all ;" (*Rex v. Thomas*, 1833, N. P., 6 C. & P. 393) ; or where the prosecutor said to the prisoner, "If you will not tell us what you know about it, we, of course, can do nothing :"—Held, inadmissible ; (*Rex v. Partridge*, 1836, N. P., 7 C. & P. 551) ; so where the confession was obtained from the prisoner, a girl fifteen years old, through the promises and threats of relatives and servants of the prosecutor :—Held, improperly

(c) BY WHOM TO BE MADE.

1. By *Principals* *.2. By *Accomplices*. See ante, tit. *Accomplice*.

(d) EFFECT OF†.

(e) HOW PROVED‡.

(f) PRISONER'S RIGHT TO COPY OF§.

received, and the conviction bad. (*Rex v. Simpson*, 1 Ry. & M., C. C. 465). But where a constable had only said, "If you will tell where the property is, you shall see your wife, and I hope you will tell, as Mrs. G. (the prosecutrix) can ill afford to lose the money;" (*Rex v. Lloyd*, 1834, N. P., 6 C. & P. 393); or where, whilst the party was in custody, another prisoner said to him, "Pray, split, I wish you would tell me how, &c.," upon which, at the prisoner's request, he took an oath not to disclose what he should say:—Held, that the confession was inadmissible. (*Rex v. Shears*, 1836, N. P., 6 C. & P. 372). And where the prisoner, under fourteen years of age, was solemnly questioned and pressed by a party not connected, nor a constable:—Held, that the statements were strictly admissible, but the mode of obtaining them strongly disapproved. (*Rex v. Wild*, 1 Ry. & M. C. C. 452).

* The principal's confession is not evidence against the accessory. (*Rex v. Turner*, 1832, N. P., 1 Moody, C. C. 347). But what was said by the prisoner's wife to the prisoner whilst in custody, is evidence against the husband. (*Rex v. Bartlett*, 1837, N. P., 7 C. & P. 832).

† A confession can only affect the person by whom it is made; (*The King v. Hevey and Others*, Q. B., Feb. Sess. 1782; 1 Leach, C. L. 232); and cannot be received to supply defective evidence. (*The King v. Mosey*, Feb. Sess. 1784; 1 Leach, C. L. 262, n.). Where what the prisoner has stated is shut out on account of the manner in which it has been obtained, it does not prevent the admissibility of facts discovered in consequence of the statement. (*Reg. v. Gould*, 1839, N. P., 9 C. & P. 364).

‡ The confession may be proved by parol evidence, though written down before the justice. (*Rex v. Harris*, 1832, N. P., Moody, C. C. 338). But it ought to be proved in the language of the prisoner. (*Rex v. Sesters*, cited Chit. Sup. to Burn's Jus. 103). Where the prisoner's statement had been made in answer to questions put by the magistrate, and been read over to him, and acknowledged in substance correct:—Held, sufficiently proved by the witnesses who deposed to the signatures of the magistrate and the prisoner without calling the magistrate or his clerk. (*Rex v. Rees*, 1836, N. P., 7 C. & P. 568; S. P. *Rex v. Reading*, 1836, N. P., 6 C. & P. 649). The rule is, for the whole statement of a prisoner to be heard without suppressing it as to the names of other parties charged. (Per Gurney, B.—*Rex v. Walkeley*, 1833, N. P., 6 C. & P. 175). Where a party charged with murder made a statement before the coroner, which purported to have been taken on oath:—Held, not receivable against him, and that parol evidence was inadmissible to show that it was not made on oath. (*Reg. v. Wheeley*, 1838, N. P., 8 C. & P. 250). Where no person was present at the time to contradict the prosecutor's statement, the prisoner was allowed to make his statement before his counsel addressed the jury. (*Reg. v. Malings*, 1838, N. P., 8 C. & P. 242). But Gurney, B., though he allowed that course, thought it ought not to be drawn into a precedent. (*Reg. v. Walking*, 1838, N. P., 8 C. & P. 243). Where the only evidence against a party charged with murder was by his own confession, which admitted that he was present at the time, but took no part in the transaction:—Held, that the whole was evidence for the prisoner, but that the jury might disbelieve any part. (*Rex v. Clewes*, 1830, N. P., 4 C. & P. 221).

§ Where the statement is returned with the deposition, the prisoner is not entitled to a copy thereof under 6 & 7 Will. 4, c. 114, but only of the depositions of witnesses. (*Reg. v. Aylett*, 1838, N. P., 8 C. & P. 669).

Confirmation. See tits.

<i>Contract,</i>	<i>Leases,</i>
<i>Covenant,</i>	<i>Legacy,</i>
<i>Ejectment,</i>	<i>Power,</i>
<i>Executor and Administrator,</i>	<i>Rent,</i>
<i>Husband and Wife,</i>	<i>Tenants in common,</i>
<i>Infant,</i>	<i>Will.</i>

Confiscation. See tits. *Prize—Ship and Shipping.*

Conies. See tit. *Game.*

Consanguinity. See tit. *Descent.*

Conscience, Court of. See tit. *Requests, Court of.*

Consent-Rule. See tit. *Ejectment.*

Consequential Damage. See tits.

<i>Criminal Conversation,</i>	<i>Malicious Prosecution,</i>
<i>Damages,</i>	<i>Master and Servant,</i>
<i>False Imprisonment,</i>	<i>Seduction,</i>
<i>Libel,</i>	<i>Slander.</i>
<i>Malicious Arrest,</i>	

Consideration. See tits.

<i>Annuity,</i>	<i>Fraud,</i>
<i>Bills and Notes,</i>	<i>Guarantee,</i>
<i>Bond,</i>	<i>Stamp,</i>
<i>Contract,</i>	<i>Usury,</i>
<i>Covenant,</i>	<i>Voluntary Conveyance,</i>
<i>Declaration,</i>	<i>Warrant of Attorney.</i>
<i>Deed,</i>	

Consignment. See tits.

<i>Carrier,</i>	<i>Ship and Shipping,</i>
<i>Lien,</i>	<i>Stoppage in transitu.</i>
<i>Principal and Agent,</i>	

Consignor and Consignee. See tits.

Carrier,
Charter-party,
Freight,

Lading, Bill of,
Principal and Agent,
Vendor and Purchaser.

Consilium. See tit. *Demurrer*.

Consistory Court. See tits. *Churches and Chapels—Courts*.

Consolidation.

I. OF ACTIONS.

(a) IN GENERAL, p. 672.

(b) IN PARTICULAR.

1. *Actions of Ejectment*. See tit. *Ejectment*.

2. *On Policies of Insurance*. See tit. *Insurance*.

(c) MOTION AND RULE FOR, p. 673.

(d) JUDGE'S ORDER FOR, p. 673.

(e) EFFECT OF, p. 673.

(f) OPENING AND SETTING ASIDE RULE FOR CONSOLIDATION, p. 673.

II. OF INFORMATIONS. See tits. *Information—Quo Warranto*.

I. OF ACTIONS.

(a) IN GENERAL.

OLDENHAM v. TREGWELL, 1827, N. P., 3 C. & P. 58.

If an action be brought on a bill, and another becomes due, and separate actions

The plaintiff sued on a bill; and after the action was commenced another bill accepted by the same defendant, of which the plaintiff was the holder, became dishonoured. The plaintiff brought a second action on that.

* Formerly two separate actions by the same parties, and for joinable causes, could not be consolidated. (*Mynot v. Bridge*, H. T. 1762, K. B., 2 Stra. 1178). But now a different rule obtains, and the plaintiff will be compelled to pay the costs of the motion made for that purpose; (*Cecil v. Briggs*, T. T. 1788, K. B., 2 T. R. 639); as if two actions be brought for trespass on the same premises at two different times. (*Anon.*, E. T. 1815, cited Chit. Rep. 70, note). And three declarations against different persons for the same assault were consolidated; (*Harper v. Woodhouse*, H. T. 1733, C. P.; Prac. Reg. 151; *S. P. Catlin v. Elliott*, H. T. 1733, C. P., Barnes, 341); though in a similar, but anterior case, the application was refused. (*Bayley v. Raby*, E. T. 1720, K. B., 1 Stra. 420). So, separate actions against husband and wife, and husband alone, cannot be consolidated. (*Swithin v. Vincent*, E. T. 1764, C. P., 2 Wils. 227).

The Judge at Nisi Prius said, a Judge at chambers, on application, would have directed the two actions to be consolidated.

brought, they will be consolidated.

(b) IN PARTICULAR.

1. *Actions of Ejectment.* See tit. *Ejectment*.
2. *On Policies of Insurance.* See tit. *Insurance*.

(c) MOTION AND RULE FOR*.

(d) JUDGE'S ORDER FOR†.

(e) EFFECT OF‡.

(f) OPENING AND SETTING ASIDE RULE FOR CONSOLIDATION§.

Conspiracy.

I. CIVIL PROCEEDINGS FOR. See tit. *Malicious Prosecution*.

II. CRIMINAL PROCEEDINGS BY INDICTMENT FOR, p. 674.

(a) RELATIVE TO THE ACTS WHICH MAY CONSTITUTE THE OFFENCE.

1. *In general*, p. 674.

2. *In particular*.

1. *For conspiring to extort or defraud*, p. 675.
2. *For conspiring to fornicate*, p. 675.
3. *For conspiring to riot*, p. 675.
4. *For conspiring to solemnize a Marriage*, p. 676.
5. *For conspiring to trespass*, p. 676.

* A rule to shew cause why the actions should not be consolidated should be obtained in term time. (See 1 Tidd, 639, 7th ed.)

† In vacation a Judge's order may be obtained for consolidating actions. (See 1 Tidd, 636, 7th ed.)

‡ A consolidation rule applies to a second and third trial, as well as the first action. (*Cohen v. Bulkeley*, T. T. 1813, C. P., 5 Taunt. 165). And where execution has been issued in one of several consolidated actions in default of bail to a writ of error, the Court will stay it in such of the actions in which bail have been put in. (*Aylwin v. Favine*, E. T. 1807, C. P., 2 N. R. 430). So, where a writ of error is pending in one of several consolidated actions, the defendants in the other actions are entitled to a stay of execution on giving security to abide the judgment in error. (*Gill v. Hinckley*, H. T. 1817, C. P., 1 B. Moore, 79).

§ The Court will open a consolidation rule, if the merits of the case do not come fairly before them on the trial of the first cause. (*Cohen v. Bulkeley*, T. T. 1813, C. P., 5 Taunt. 165). But newly discovered evidence seems to afford no ground for such an application; (*Pullen v. Parry*, H. T. 1815, 1 Chit. Rep. 709, note); though, in another case, such rule was set aside on account of the absence of a material witness. (*Holman v. —*, H. T. 1815; 1 Chit. Rep. 710, note).

6. *For conspiring to pervert the course of Justice*, p. 676.

7. *For conspiring to raise the Public Funds*, p. 676.

8. *For conspiring to take an unlawful Oath*, p. 676.

(b) *RELATIVE TO THE NUMBER OF PERSONS WHO MAY COMMIT THE OFFENCE*, p. 677.

(c) *BAIL ON*, p. 677.

(d) *RELATIVE TO THE INDICTMENT*, p. 677.

(e) *RELATIVE TO THE TRIBUNAL BEFORE WHICH INDICTMENTS MAY BE TRIED*, p. 678.

(f) *RELATIVE TO THE REMOVAL OF THE INDICTMENT*, p. 678.

(g) *RELATIVE TO THE EVIDENCE*, p. 679.

(h) *RELATIVE TO THE WITNESSES*, p. 679.

(i) *RELATIVE TO THE VERDICT*, p. 680.

(j) *RELATIVE TO MOTIONS IN ARREST OF JUDGMENT AND FOR NEW TRIAL*, p. 680.

(k) *RELATIVE TO THE PUNISHMENT*, p. 680.

III. INFORMATION FOR, p. 680.



I. CIVIL PROCEEDINGS FOR. See tit. *Malicious Prosecution*.

II. CRIMINAL PROCEEDINGS BY INDICTMENT FOR.

(a) *RELATIVE TO THE ACTS WHICH MAY CONSTITUTE THE OFFENCE.*

1. *In general*.*.

* A conspiracy is a consultation and agreement between two or more persons either falsely to charge another with a crime punishable by law, or wrongfully to injure or prejudice a third person, or any body of men in any other manner; or to commit any punishable offence by law; or to do any act with intent to pervert the course of justice; or to effect a legal purpose with a corrupt intent, or by improper means; and by 33 Edw. 1, st. 2, conspirators are thus defined: "Conspirators be they that do confederate or bind themselves by oath, covenant, or other alliance, that every of them shall aid and bear the other falsely and maliciously to indict or cause to indict, or falsely to move or maintain pleas, and also such as cause children within age to appeal men of felony, whereby they are imprisoned and sore grieved, and such as retain men in the country with licenses or fees to maintain their malicious enterprises, and this extendeth as well to the takers as to the givers; and stewards and bailiffs of great lords, which by their seignory, office, or power, undertake to bear or maintain quarrels, pleas, or debates, that concern other parties than such as touch the estate of their lords or themselves." From this definition of conspirators it seems clearly to follow, that not only those who actually cause an innocent man to be indicted, and to be tried upon the indictment and lawfully acquitted, are properly conspirators; but persons are also guilty of this offence who basely conspire to indict a man falsely and maliciously, whether they do any act in furtherance of such conspiracy or not; for the words of the statute seem expressly to include all such confederacies under the notion of conspiracy, whether there be or be not any prosecution. (1 Hawk. P. C., c. 72, s. 2). But, in 1 Hawk. P. C., c. 72, s. 2, it is said, that, since

2. *In particular.*1. *For conspiring to extort or defraud*.*

REX v. HOLLINGBERRY, T. T. 1825. K. B. 4 B. & C. 329; S. C. 6 D. & R. 345.

THE defendants being indicted for conspiring falsely to indict Josiah Taylor, with intent to extort money, were found guilty of conspiring to indict with that intent, but not of falsely conspiring &c., as laid. On motion in arrest of judgment—

Per Cur.—This was an indictment for conspiring falsely to indict Taylor for the purpose of extorting money from him; the jury found the parties guilty of conspiring to indict Taylor for the purpose of extorting money. Now, in criminal cases, it is sufficient for the prosecutor to prove so much of the charge as makes an indictable offence. The finding of the jury proves the defendants guilty of conspiring to make a charge in order to extort, which is in itself a misdemeanor, whether the charge be true or false. Besides, the third count is not open to this objection, for it charges the defendants with conspiring to indict, and not *falsely* conspiring to indict; and the rule is, that on a motion in arrest of judgment, if one charge is made out in any part of any one count so as to constitute a crime, that will suffice to support the indictment without proving the whole count.

Conspiring to indict for the purpose of extorting money is a misdemeanor, whether the charge be true or false†.

2. *For conspiring to fornicate‡.*3. *For conspiring to riot§.*

it does not appear to have been solemnly resolved that persons offending by a false and malicious accusation against another are indictable upon this statute, it seems to be safer and more advisable to frame an indictment for such an offence upon the common law than upon the statute.

If brokers agree together before a sale by auction that one only of them shall bid for each article sold, and that all articles thus bought by any of them shall be sold again among themselves at a fair price, and the difference between the auction price and the fair price divided among them, this is a conspiracy for which they are indictable. (*Levi v. Levi*, 1835, N. P., 6 C. & P. 239).

* Conspiracy to defraud is an indictable offence; as where three persons agreed that one should accept a fictitious bill, and that the others should indorse and negotiate it. (*Rex v. Hevey and Others*, Feb. Sess., 1782, Old Bailey, 1 Leach, C. L. 232). So, where certain persons conspired to cause themselves to be believed persons of large property for the purpose of defrauding tradesmen. (*Rex v. Roberts*, T. T. 1808, N. P., 1 Camp. 399).

† An indictment for a conspiracy to fabricate and sell as good shares in a joint-stock company may be sustained, although such company may not be well constituted; but, semble, mere scrip receipts cannot be deemed shares, although they may be converted into such. (*Rex v. Mott*, 1827, N. P., 2 C. & P., 521).

‡ An indictment at common law will lie for conspiring to take away a woman from her parents, and then seducing her. (*Rex v. Lord Grey*, 3 St. Trials, 519; S. C. 1 East, P. C. 460).

§ Persons coming to a theatre with a predetermined purpose of interrupting the performance may be indicted for a conspiracy. (*Clifford v. Brandon*, M. T. 1810, N. P., 2 Campb. 358).

4. *For conspiring to solemnize a Marriage*.*

REX v. SEWARD, T. T. 1834. K. B. 3 N. & M. 557.

Unless unlawful means be used, conspiring to effect a marriage between paupers, to exonerate the parish, is not illegal*.

AN indictment for a conspiracy to procure the marriage of two paupers stated that R. B. S. was a poor unmarried man, unable to maintain himself and any poor woman whom he might marry and take to wife; and that the place of his last legal settlement was in the parish of St. Ives; and that one S. M. B. was a poor unmarried woman with child, and was legally settled in the parish of Chatteris; that the defendants, well knowing the premises, and unlawfully, wickedly, and wrongfully combining, conspiring, devising, and intending to exonerate from and discharge the parishioners &c. of Chatteris from the charge and expense which might ensue to the said parishioners &c. from and in consequence of the said S. M. B., as a poor person, being an unmarried woman with child &c., and combining &c., to injure the parishioners &c. of St. Ives, and to burthen the said parishioners of St. Ives with the maintenance of the said S. M. B., and with the charges and expenses of the confinement and lying-in and delivery of the said S. M. B., unlawfully and wickedly did combine, conspire, confederate, and agree, and did then and there wrongfully and unlawfully, and for the purpose last aforesaid, cause and procure the said R. B. S., &c., to intermarry with the said S. M. B.; and that, in pursuance of the said combination and contriving of the defendants, they, the said R. B. S. and S. M. B. did intermarry. On motion in arrest of judgment—

Per Cur.—We are of opinion that no sufficient offence is charged in the indictment. It seems to us that the charge to procure a marriage is in itself no offence at all; and the indictment does not state that the defendants procured it by any unlawful means: and as to conspiring to discharge their own parish, that is no offence whatever, unless they used unlawful means to charge another parish.

5. *For conspiring to trespass†.*6. *For conspiring to pervert the course of Justice‡.*7. *For conspiring to raise the Public Funds§.*8. *For conspiring to take an unlawful Oath||.*

* In a prior case it was holden, that a contrivance to procure the solemnization of a marriage amounted to a conspiracy. (*The King v. Robinson and Taylor*, K. B., Oct. Sess. 1746, 1 Leach, C. L. 37; S. C. 2 East, P. C. 1010).

† A bare contrivance to commit a civil trespass is not an indictable offence. (*Rex v. Turner*, H T. 1811, K. B., 13 East, 228).

‡ Perverting the course of justice, by procuring a false certificate from a magistrate, is a conspiracy. (*Rex v. Mawbey*, E. T. 1796, K. B., 6 T. R. 619). So, where persons charged a man with being a robber merely for the purpose of obtaining a reward for his apprehension, it was holden a conspiracy. (*Rex v. Macdaniel*, 1 Leach, C. L. 44).

§ Contriving to raise the price of the public funds on a particular day by false rumours is a conspiracy. (*Rex v. De Berenger*, T. T. 1814, K. B., 3 M. & S. 67).

|| Administering an oath, binding the party not to disclose the secrets of the association into which the party, at the time of the taking the oath, was admitted,

(b) RELATIVE TO THE NUMBER OF PERSONS WHO MAY COMMIT THE OFFENCE*.

(c) BAIL ON†.

(d) RELATIVE TO THE INDICTMENT‡.

REX v. BIRS, E. T. 1834. K. B. 3 N. & M. 475; S. C. 1 Ad. & E. 327.

THIS was an indictment against the two defendants for conspiring together falsely to charge two persons of the name of Wilson, the owners of the Holloway coach, with an offence against "An Act passed in the second and third years of the reign of Will. 4, c. 12;" and in a subsequent part of the indictment, the statute was referred to as the "statute aforesaid." A verdict passed for the Crown. On motion in arrest of judgment, it was contended, that an act of Parliament could not be referred to as passed in two years of one King. If one party, in pleading a statute, misrecite the matter, year, day, or place, the other party may demur generally, there being no such statute; for he who takes upon him to set out a statute must do it truly. And again, if he recite a particular statute, and there is no such statute, his action is grounded on that which does not exist. (Bac. Abr., "Statute," L. 5). In 1799 an act was introduced by which it was enacted, "That the day on which an act received the royal assent should be the day from which it was to

An indictment for conspiring to convict contrary to statute, must not state the act to be "in the 2 & 3 years," &c.

held to be an offence within the 37 Geo. 3, c. 123, and that the enacting part of that statute was not controlled by the preamble:—Held, also, that the oath was not required to be of a formal nature, if intended to operate as such, and was so understood by the party taking it; (*Rex v. Loveless and Others*, 1885, N. P., 2 M. & Rob. 349; 6 C. & P. 596; and see *Rex v. Brodribb*, 10 C. & P. 511, note); as an oath to keep all the secrets of a trades-union. (*Rex v. Ball*, 1836, N. P., 6 C. & P. 563; S. P. *Rex v. Dixon*, Ib. 601).

* Where two conspire, and one dies, the other may still be indicted for the conspiracy; (*Rex v. Nicols*, M. T. 1742, K. B., 13 East, 412, n.; S. C. 2 Stra. 1227); but one person alone cannot be guilty of this offence; therefore, if all the defendants who are prosecuted for such conspiracy be acquitted but one, the acquittal of the rest is an acquittal of that one also; (See 1 Hawk. P. C. 572; 3 Burr. 1262; 12 Mod. 262); yet where one is convicted, he may be sentenced before the others are tried; (*Rex v. Cooke*, 5 B. & C. 538); and it has been holden that such a prosecution is not maintainable against a husband and wife only, because they are esteemed but as one person in law. (See 1 Hawk., P. C. 672).

† See 7 Geo. 4, c. 64, s. 1.

‡ The venue ought to be laid in the county where the combination took place, and not where the object was carried into execution; (*Reg. v. Best*, T. T. 1704, K. B., 1 Salk. 174; S. C. 2 Ld. Raym. 1167); but there seems to be no reason why the crime of conspiracy, amounting only to a misdemeanor, may not be tried wherever one distinct overt act of conspiracy is committed. (*Rex v. Brisac and Scott*, T. T. 1803, K. B., 4 East, 164). The Court refused to change the venue on an indictment for a conspiracy to destroy foxes, &c., on the ground that the gentry of the county were fox-hunters; (*Rex v. King*, H. T. 1820, K. B., 2 Chit. Rep. 217); at all events, it cannot be changed before issue joined. (*Rex v. Forbes*, M. T. 1833, B. C., 2 Dowl. P. C. 440).

Since 6 Geo. 4, c. 16, it is still necessary, on an indictment for conspiring to conceal goods of the bankrupt, to aver and prove the facts shewing the act to be unlawful. Where the indictment only stated that a commission issued, under which the party was duly found and declared to be a bankrupt, without further averring the trading, petitioning creditor's debt, &c.:—Held, insufficient. (*Rex v. Jones*, Abr., ante, tit. *Bankrupt*, p. 180).

CONSPIRACY—As to the Indictment.

take effect, unless particularly provided for otherwise." Since this act, therefore, as it is impossible that any one day should be in two years, so it is impossible that the offence should be described as an offence against an act passed in two years, and the indictment cannot be sustained. In *Nutt v. Stedman*, (Fortesc. 572), it was held, that the information ought to have been filed as of 8 Will. 3, when the session began, instead of 8 & 9 Will. 3. *Ramsey v. Tuffnell*, (9 B. Moore, 425; S. C. 3 Bing. 255), is also in point.

Per Cur.—We are of opinion, that the objection made to the indictment is a good objection. We cannot distinguish this case from the case of *Langley v. Haynes*, (Moore, 302), which case is recognised in 2 Hawk. 217, and acted upon in the same term in the case of *Nutt v. Stedman*.—Rule absolute.

REGINA v. PEEK, E. T. 1839. Q. B. 1 P. & D. 508.

An indictment for conspiring to defraud need not state the names of the parties intended to be defrauded*.

AN indictment charged in the first count, that the defendants unlawfully conspired to defraud divers persons, who should bargain with them for the sale of merchandize, of great quantities of such merchandize, without paying for the same, with intent to obtain to themselves money and other profit. The second count charged, that two of the defendants being in partnership in trade, and being indebted to divers persons, unlawfully conspired to defraud the said creditors of payment of their debts, and that they and the other defendant, in pursuance of the said conspiracy, falsely and wickedly made a fraudulent deed of bargain and sale of the stock in trade of the partnership for a fraudulent consideration, with intent thereby to obtain to themselves money and other emoluments to the great damage of the said creditors.

The Court held—first, that the first count was not bad for omitting to state the names of the persons intended to be defrauded, as it could not be known who might fall into the snare; but that the count was bad for not shewing by what means they were to be defrauded; secondly, that the second count was bad for not alleging facts to shew in what manner the deed of sale was fraudulent.

(e) RELATIVE TO THE TRIBUNAL BEFORE WHICH INDICTMENTS MAY BE TRIED†.

(f) RELATIVE TO THE REMOVAL OF THE INDICTMENT‡.

* An indictment for a conspiracy to cheat and defraud a party of the fruits and advantages of a verdict obtained, is too general and bad in point of law. (*Rex v. Richardson*, 1838, N. P., 1 M. & Rob. 402). So, a count in an indictment for a conspiracy to cheat and defraud "the just and lawful creditors" of the party:—Held bad, as too general; held also, that an agreement entered into by the party was admissible in evidence to shew the fraud intended or other crime, although not stamped. (*Rex v. Fowle*, 1831, N. P., 4 C. & P. 592).

† Justices of the peace, at their sessions, may try indictments for a conspiracy. (*Rex v. Rispal*, H. T. 1762, K. B., 3 Burr. 1320; S. C. 1 Blac. 368; S. P. *Rex v. Edwards*, M. T. 1737, K. B., 8 Mod. 321).

‡ Upon the removal of an indictment for a conspiracy from the quarter sessions into this Court, the defendants' recognisance, if insufficient, will be discharged and a fresh one required. (*Rex v. Hooper*, T. T. 1819, K. B., 1 Chit. Rep. 491).

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